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IN THE

# Supreme Court of the United States

**October Term, 1961**

CROWN ZELLERBACH CORPORATION,
*Petitioner,*

—against—

FEDERAL TRADE COMMISSION,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARTHUR H. DEAN
HOWARD T. MILMAN
ROY L. PROSTERMAN
48 Wall Street
New York 5, N. Y.

PHILIP S. EHRLICH
2002 Russ Building
San Francisco 4, California.

*Attorneys for Petitioner*

SULLIVAN & CROMWELL
*Of Counsel*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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*To The Honorable The Chief Justice and Associate Justices of the Supreme Court of The United States:*

Crown Zellerbach Corporation (hereafter "Crown") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming an order of the Federal Trade Commission.

The Federal Trade Commission had held that the acquisition by Crown in June 1953 of the stock of St. Helens Pulp & Paper Company (hereafter "St. Helens") violated § 7 of the Clayton Act, as amended, and entered an order of divestiture.

## Citations to Opinions Below

The findings, conclusions and order of the Federal Trade Commission Hearing Examiner, dated February 25, 1957, are printed at R. 547-600* and reported at 54 F.T.C. 769. The opinion and order of the Federal Trade Commission, dated December 26, 1957, are printed at R. 603-23 and reported at 54 F.T.C. 798.

The opinion of the Court of Appeals for the Ninth Circuit is printed in the Appendix hereto, pages A-9 through 75, and is reported at 296 F. 2d 800. The opinion of the Court of Appeals denying Crown's petition for rehearing is printed at Appendix A-76 through 82 and is reported at 296 F. 2d 834.

## Jurisdiction

The decision of the Court of Appeals was entered on June 5, 1961; the decision denying rehearing was entered on December 22, 1961; the judgment of the Court of Appeals was entered on January 29, 1962. The jurisdiction

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* "R." references are to pages of the certified record as prepared for the use of the Court below (R. 1-5481). "CX" and "RX" references are to the certified exhibits of the Commission and Crown, respectively, as prepared for the use of the Court below. When the exhibit appears in one of the twenty-one sequential exhibit volumes (I-XXI) the exhibit number is followed by a bracketed indication of volume and page (*e.g.*, "CX 51 [VII, 2846]" refers to that portion of Commission's Exhibit 51 found at page 2846 of volume VII in the series). The transcript of record and exhibits have been duly certified and filed with the Clerk of the Court pursuant to Rule 21(3). "A-" references are to the Appendix hereto (A-1 through 84), containing relevant statutory materials and the opinions and decree of the Ninth Circuit.

of this Court is invoked under 15 U.S.C. § 21 (64 Stat. 1126, amended by 73 Stat. 243)* and 28 U.S.C. § 1254.

## Questions Presented

1. Whether, in reviewing and affirming a determination of the Federal Trade Commission that an acquisition violated § 7 of the Clayton Act, as amended, a Court of Appeals has rendered a decision in conflict with *S.E.C. v. Chenery Corp.*, 318 U. S. 80 and 332 U. S. 194, and *Erie Sand and Gravel Co. v. FTC*, 291 F. 2d 279 (3rd Cir. 1961), when the Court's affirmance was upon grounds different from those of the Commission in that (a) the Court rejected the Commission's findings as to the relevant line of commerce and the relevant section of the country and, on the basis of the Court's different rationale and its own review of the record made before the Commission, the Court found the relevant line of commerce and section of the country to be different from those found by the Commission, and (b) the Court rejected the Commission's bases for determining that the effect of the acquisition may be substantially to lessen competition, held that different factors should be considered, and made *de novo* findings—which are not supported by substantial evidence—as to the market shares (*i.e.*, sales) of the acquiring, acquired, and competing companies, replacing the production figures relied upon by the Commission and the rejected Commission finding that imports from other parts of the country

* While jurisdiction technically arises under § 11 of the Clayton Act as it read at the commencement of this proceeding, neither the scope of jurisdiction nor any of the matters presented by this petition were affected by the amending language, and references herein will not preserve the distinction between that earlier version and the current 15 U.S.C. § 21.

into the chosen geographical area were "relatively insignificant".

2. Where a Court of Appeals has held that the decisions of this Court in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, and *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, are not relevant in proceedings under § 7 of the Clayton Act; and that the Federal Trade Commission need not consider evidence as to the flexibility of production equipment and the interchangeability of products in defining the relevant market, whether that Court of Appeals has rendered a decision in conflict with those decisions and with *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, *Erie Sand and Gravel Co.* v. *FTC*, 291 F. 2d 279 (3rd Cir. 1961), and *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F. 2d 524 (2d Cir. 1958).

3. Whether a Court of Appeals has committed substantial error under the provisions of § 10(e) of the Administrative Procedure Act and has deprived a party of property without due process of law contrary to the Fifth Amendment to the Constitution, where it has held an acquisition unlawful under § 7 of the Clayton Act without passing upon that party's contention that the proceedings before the Federal Trade Commission were based in substantial part on secret *ex parte* survey evidence, that petitioner was denied the right of cross-examination, that the proceedings were conducted in clear violation of §§ 7 (b) and (c) of the Administrative Procedure Act, § 11 of the Clayton Act, and § 6 of the Federal Trade Commission Act, and that the decision was based in large part upon evidence known to be unreliable and untruthful when received.

4. Whether a Court of Appeals has committed substantial error under the provisions of § 10(e) of the Administrative Procedure Act where, without passing on a party's contention of error on the point, it has affirmed an order of the Federal Trade Commission issued in a proceeding under § 7 of the Clayton Act that

(a) would require an acquiring company to divest itself of assets of an acquired company which form a separate and distinct property found to be outside the line of commerce involved, in the absence of any finding or evidence that such assets were necessary to the conduct by the acquired company of its business within the line of commerce involved; and

(b) would require an acquiring company to divest itself of the assets of an acquired company "as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of acquisition."

## Statutes Involved

The statutory provision principally involved is § 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Also involved are 5 U.S.C. §§ 1009(b) and (c) and 1009(e), and 15 U.S.C. §§ 21 and 46. The texts of these provisions are printed, *infra*, A-1 through 8.

## STATEMENT OF THE CASE

This is the first case to bring up for review a Federal Trade Commission decision rendered under the amended § 7 of the Clayton Act. It raises issues pertaining to the substantive and procedural standards to be applied

in Commission proceedings under that section, and to the mode and scope of review by the Courts of Appeal of a divestiture order of the Commission. Commission counsel has agreed that the decision in this case will have "far reaching significance" with respect to the procedures to be followed and the grounds for decision in other §7 proceedings before the Commission (R. 5424-25).

## The Acquisition of St. Helens

When Crown acquired St. Helens in June 1953, both companies were engaged in the manufacture of paper and paper products in the Pacific Northwest, and in the sale of such products in the Pacific Coast states and other areas of the country. Crown was a large and successful company with paper mills in Oregon and Washington and was currently considering an expansion of its production facilities to meet anticipated expanding needs of its customers. The keynote to the situation of St. Helens is found in the statement of the Court of Appeals that "The circumstances would permit a finding that the directors wanted to quit" (A-67). St. Helens was a small paper company with an old, rundown mill at St. Helens, Oregon, which badly needed rehabilitation. After years of being able to sell whatever it produced because of the war and postwar shortages, St. Helens' management discovered that its paper was not acceptable in the market; in 1952, it was able to sell only 52,516 tons out of the 59,449 tons it produced (CX 51 [VII, 2846]; CX 117 [XVIII at p. 7]*).

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* Citations to pages of the individual printed exhibits are given for those exhibits not contained in the twenty-one sequential volumes, and for volumes XVIII and XIX, which contain CX 117 and volumes XX and XXI which contain CX 170 (mislabelled on the cover "Respondent's Exhibit").

The directors had authorized a $5 million modernization program, mostly with borrowed money, but in 1952 the Board of Directors discovered that the management had committed St. Helens to capital expenditures of $9,300,000. The money was not available and work had to be stopped even on partially completed projects. (R. 1797-98, 2091-92, 2121, 2174, 2176; RX 12Z-101 [XV, 4597].)

The directors of St. Helens determined to sell the business and offered it to Marathon Corp. and then to Olin Industries, but neither would buy the company (R. 2188, 2190, 2268-69, 3849-50, 3853, 3855-65). An independent expert retained by Olin Industries reported that the mill was in such poor condition that it was not competitive and that a minimum rehabilitation program would cost $13 million (R. 3804). The directors then approached Crown and offered to sell the company to it.

Crown at that time was forecasting a paper shortage as demand was outstripping increases in productive capacity. The then partially rebuilt St. Helens mill offered the possibility of increasing its capacity substantially beyond that contemplated by St. Helens, in which event the rebuilt mill could take care of all the requirements of existing St. Helens customers and make available additional paper for Crown's own customers more quickly than additional capacity could be built at a new location (R. 563).

The key attraction to Crown was the fact that St. Helens had a badly unbalanced mill. Some of its major equipment would support a 300-ton per day mill, but other equipment limited it to a production of only 180 tons per day. Crown could cure this uneconomic situation by increasing the mill output capacity to 300 tons

per day and thereby make available an additional 120 tons of paper (R. 1797-98, 2167-74; RX 12Z-96 [XV, 4587]).

Crown acquired substantially all of the capital stock of St. Helens in June 1953 in exchange for its own common stock valued at approximately $9,550,000 (R. 14-15, 25). Crown then proceeded to spend an additional $14 million to improve the mill and to expand its capacity (R. 2965-67). St. Helens also owned 117,000 acres of timberlands. The limited value of the mill when it was acquired by Crown may be inferred from the fact that the whole company was acquired for $9,550,000, whereas the timberlands were found by the Commission to have had a retail value of $8 million (R. 558).

The Federal Trade Commission had investigated the proposed transaction before its consummation (R. 646) but took no action until February 15, 1954, eight months after Crown had acquired the St. Helens stock, and after Crown had committed itself to the additional modernization and expansion program. The Commission's complaint, issued pursuant to § 11 of the Clayton Act, charged that Crown and St. Helens had been competitors and that the acquisition violated § 7 of the Clayton Act as amended in 1950.

By the time of the hearings before the Commission in 1955, Crown had substantially rehabilitated and expanded the St. Helens mill and the anticipated paper shortgage had arrived so that mills all over the country were placing their customers on allocation (see R. 1413, 1435, 3779-81; RX 47 [XVI, 4763], RX 75 [XVI, 4918], RX 91 [XVII, 5087]). Disregarding the fact that Crown's acquisition of St. Helens resulted in making available a needed supply

of paper which would otherwise not have been available, so that the shortage would have been correspondingly more acute (and that it resulted in employment at St. Helens, Oregon, where otherwise there would have been unemployment), the Commission and the Court of Appeals instead addressed themselves to the fact that as the result of the greatly increased demand for paper a few of the former customers of St. Helens could not get all the paper they wanted when and how they wanted it, whereas prior to the acquisition when St. Helens' production substantially exceeded its sales, its customers were permitted to buy whatever they wished. (See R. 615-17; A-58 through 63.)*

## The Paper Industry

"Paper" (including "paperboard") is the generic term for all kinds of matted or felted sheets of fibre formed on a wire screen from a water suspension (R. 567). In trade parlance, the term "paper industry" includes paper in this generic sense as well as products made from paper, such as cartons, bags and towels.

Crown and St. Helens were both members of what the Census describes as the paper and paperboard industry. Total industry production in 1953 was 23,614,568 tons, of which Crown produced 3.3% and St. Helens produced .24% (RX 62, p. 19). St. Helens did not compete in all types of paper or in all sections of the country. The apparent importance of Crown and St. Helens would therefore

* Convincing evidence of the minimal importance of St. Helens even to its own jobber customers, who constituted most of its customers, was the Commission's admission that St. Helens was the supplier of less than 6% of the paper purchased by these relatively few customers (R. 1954-55).

vary according to whether the market was broadly or narrowly defined. St. Helens would look most important if the market were defined to include only the products which it principally sold and the geographic areas where its customers were concentrated.

According to paper industry usage, there are three general types of paper: (i) newsprint; (ii) fine paper (mainly printing and writing papers); and (iii) coarse papers. The latter term, in a sense much different from the industry usage, is also used to designate a Census statistical subcategory, and since both meanings of the term assumed importance for the present case, the Hearing Examiner distinguished the two usages by the coined terms "Census coarse paper" and "trade coarse paper", which have been employed for the sake of clarity in subsequent proceedings.

According to trade usage, the term "coarse paper" includes both the jumbo roll of paper produced by the paper-making machine and the converted product into which it is made; these converted products include shipping sacks, bags, cartons, towels, tabulating cards, waxed paper, wrapping paper, and many other converted paper products.

The Census classification system covers only the jumbo rolls produced by the paper machine; the Census does not concern itself directly with the products into which the paper is made. It classifies its production statistics according to the reporting manufacturers' information as to the use to which the paper is eventually to be put by the customer. Thus, all paper which is to be used to make bags is classified as bag paper; all paper to be used to make shipping sacks is classified as shipping sack paper; all paper to be used to make paper containers is classified as containerboard, etc. These classifications do not depend upon

and do not necessarily denote any differences in the paper itself. Identical paper, used to make different converted paper products, would be reported by the Census in different classifications according to the manufacturer's information as to intended use by the customer.

The Census has nine major categories in which it classifies the mill production of trade coarse paper. What the Hearing Examiner has called the "Census coarse paper" classification is one of these nine, and includes paper which is used by the customer (or the mill itself) to make wrapping paper, bags, shipping sacks, gummed tape, waxed paper and some miscellaneous products.*

St. Helens did not produce newsprint or fine paper and it is agreed that these products are not relevant here. St. Helens was a trade coarse paper mill, producing trade coarse paper which was classified, according to its customers' uses, in several Census categories for reporting trade coarse paper statistics. The typical Fourdrinier paper machine can make paper for a wide variety of uses. St. Helens' two paper machines made paper which was used by St. Helens in its own converting operations or by its customers to make wrapping paper,** paper bags, ship-

* The Census' description of its classification and instructions to reporting paper manufacturers, as of February 1954, are set forth in JSX 62, pp. 34-52. The "Census coarse paper" classification has changed from time to time without apparent reason, *e.g.*, it formerly included toweling and "special industrial paper", both of which are now excluded (R. 1050, 4504). The Commission's expert economist was able to give no explanation of the basis for the Census' nine statistical categories for trade coarse paper.

** "Wrapping paper" according to Census classification is the jumbo roll of paper as it comes off the paper machine. "Wrapping paper", as it is generally sold, is first cut into narrower widths and lengths and rolled on a core or spool for use by the consumer.

ping sacks, envelopes, gummed tape, waxed paper, paper containers, tags, towels, paper cans, raisin trays, fruit and vegetable wrap, etc. (RX 62, pp. 28-33).

## The Proceedings Before The Commission

The nature of the paper industry's product and the Census method of classifying production have been of critical importance throughout the case.

Nationally, Crown had only 2.6% of the mill production of trade coarse paper and St. Helens had .3%.* (see RX 62, p. 19). Even of "western" production, to which the Commission limited its consideration, Crown and St. Helens had respectively only 23.1% and 3.1% of total local production of 1,838,599 tons of trade coarse paper (see *id.* at p. 23).

The Commission, therefore, narrowed its gaze still further and found that the relevant line of commerce was only that trade coarse paper which, based on assumed customer use of the paper, the Census would classify as Census coarse paper. In this much smaller category Crown had 51.5% and St. Helens had 11% of local western production of 437,384 tons (R. 573-74).

The Commission further found that the relevant geographic market was the eleven western states which constituted the Census' reporting area for the "West" (California, Oregon, Washington, Idaho, Montana, Wyoming, Utah, Colorado, Nevada, Arizona and New Mexico). The

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* All production statistics are on the basis of paper machine production. No statistics are available for the converted paper products made from this paper.

Commission, however, did not concern itself with Crown's and St. Helens' shares of *sales* of Census coarse paper in that area, but rested solely on the *production* statistics, despite evidence that Crown's and St. Helens' local sales were far less than their production, and that mills in other areas of the country had substantial sales in the west.

The Court of Appeals narrowed the geographic market to the three Pacific Coast states and added paper bags to the Commission's "Census coarse paper" line of commerce. The Court's reasoning was as follows:

> (1) Geographically, the Commission should have ignored any states where St. Helens was not a substantial competitor because the acquisition of St. Helens could by definition not substantially reduce competition in such states (A-36, 37); * and
>
> (2) The line of commerce should include any use classification where St. Helens' or its customers' use was substantial in comparison with St. Helens' overall production, and should exclude all classifications where such use was not substantial (A-18, 21, 22, 31).

The line of commerce alleged in the complaint was rejected by both the Commission and the Court of Appeals. Also rejected was the broader line of commerce suggested by Crown, which was based on the fact that all trade coarse paper made by a paper mill is economically a single product. As did other trade coarse paper mills, St. Helens made, from the same raw materials and on the same machines, paper which, by reason of widely di-

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* Compare the testimony of the Commission's economist that there is "no question" about the eight Mountain states being part of the "marketing area of these Western companies" (R. 5121); the only issue on that score was whether the market area was greater than this eleven state area.

verse customer uses, was classified by the Census not only as Census coarse paper but also within other statistical categories of the Census.

That the versatile Fourdrinier paper machine, which is practically standard equipment in trade coarse paper mills, can make paper which would be classified within the lines of commerce found by the Commission or the Court, and could also make paper which would be classified outside these lines of commerce, was not in dispute but was expressly found by the Commission. (See, *e.g.*, Findings 52, 53; R. 571-72.) However, both the Commission and the Court of Appeals rejected this fact as irrelevant. They ignored the further fact that paper mills—including St. Helens'—typically alternated their production between paper classified within, and paper classified outside, these lines of commerce.*

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* RX 42, containing samples of paper produced at the St. Helens mill on commercial orders, shows, for example, that its two machines produced "Census coarse paper" ranging in basis weight (the measure of the weight in pounds of a ream of 500 sheets, each 25 x 40 inches, of the particular paper) from 20 lb. bag paper (RX 42-G) to 125-lb. wrapping paper (RX 42-Z-114). In the same weight range, the machine produced trade coarse paper which the Census would classify as "container board", ranging from 52-lb. corrugating (RX 42-Z-66) to 135-lb. liner (RX 42-Z-116); it produced Census "special industrial" trade coarse paper ranging from 60-lb. file folder (RX 42-Z-70) to 135-lb. tagboard (RX 42-Z-118); it also produced 14-lb. (RX 42-D) and 32-lb. (RX 42-Z-3) trade coarse paper classified as Census "sanitary tissue". It will be noted from an examination of this exhibit and of RX 8, containing samples of paper produced on a single machine by Crown, that the various samples classified as Census coarse paper vary widely among themselves in weight and appearance, while there is often closer similarity between paper classified as Census coarse paper and paper falling in other Census categories.

Both the Commission and the Court of Appeals also ignored the fact that paper and bags sell for the same price in the Pacific Coast states as in Texas and in New York (R. 1483-87, 1671-79, 1682, 2543; RX 70-74 [XVI, 4910-17]). The evidence is that the price leaders are the large eastern mills and the price which they set becomes the price in the Pacific Coast states (see R. 1483-84). Crown and St. Helens sold paper and bags in Texas and Missouri at the same price as in the Pacific Coast states. Hudson and International Paper Company sold paper from their eastern mills to the Pacific Coast states at the same price they charged in the east.*

**(a) The Complaint**

The complaint alleged that Crown was the largest paper manufacturer in the Pacific Coast states; that Crown produced paper of various kinds; that the kraft papers** it produced included

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* The Ninth Circuit reasoned that Crown and St. Helens were *necessarily* more important in the Court's Pacific Coast states market than in the Commission's eleven state market (A-70); the Court ignored the fact that the coastal cities are economically more accessible to eastern mills by water than the excluded Mountain states are by rail. The Court admitted, for example, that Hudson Paper Company, an eastern supplier, sold as many tons of manufactured bags in the three Pacific Coast states as St. Helens, all of which it shipped by water (A-43). *Mutatis mutandis*, St. Helens sold more paper in New York than in any state except California and Washington (see CX 117 [XVIII-XIX]).

** "Kraft" paper is a term generally used to describe paper made from "kraft" pulp. "Kraft" pulp is pulp made from wood by a chemical process known as the "kraft" or sulphate process. Most wood pulp is now made by the "kraft" process. (R. 568; RX 92A, pp. 17-25) All of St. Helens' paper was kraft paper. Crown's trade coarse paper included both kraft paper and "sulphite" paper, which is paper made from pulp by the sulphite chemical process.

> "machine-finished and machine-glazed papers, wrapping papers, butcher papers, gumming papers, waxing papers, bag papers, multiwall sack papers, envelope papers, other converting papers, and other kraft papers";

and that among the paper products manufactured by Crown (*i.e.*, the so-called "converted" paper product into which the paper coming off the machines is transformed by various additional operations such as cutting or gluing) are:

> "grocery bags (such as grocery, carry, liquor and shopping bags) and odd bags (such as garment, notion, millinery, shoe and bread bags)";

and that a substantial part of said products is sold in the Pacific Coast states (R. 4-5, 8-9).

The complaint alleged that St. Helens also produced and sold the kraft paper and paper products enumerated above as having been made by Crown; that it was one of the three major suppliers of such papers and paper products in the Pacific Coast states; and that approximately 78% of its sales of such products were in the Pacific Coast states (R. 9-12).

The complaint then alleged that Crown, St. Helens and Longview Fibre Co., of Longview, Washington (a strong independent company), made 85% of the sales of the named products in the Pacific Coast states, with Crown accounting for 50% of the total sales and St. Helens, 20% (R. 12-13).

The complaint alleged finally that the effect of Crown's acquisition of St. Helens may be substantially to lessen competition or to tend to create a monopoly in "the lines

of commerce, as "commerce" is defined in the Clayton Act, in which [Crown] and St. Helens were engaged in the Western States [undefined], and more particularly in the Pacific Coast States of the United States, and in each of them" (R. 15).

The answer admitted the acquisition and that Crown and St. Helens produced paper classified as alleged, but denied the statistical and conclusory allegations of the complaint.

**(b) The Market Evidence**

The Commission's principal evidence was a secret *ex parte* mail survey of certain paper customers in the eleven western states. 1300 pages of testimony were devoted to this survey,* the purported results of which were originally embodied in the lengthy report which was received in evidence as Commission's Exhibit 62, and later in the 338-page report which is now Commission's Exhibit 170. Dr. Barnes, a Commission economist, having recommended that a complaint be issued against Crown in the first place (R. 722), contributed 95 pages of conclusions in support of his recommendation (R. 5162-5244). These conclusions were based entirely upon the survey.

In order to exaggerate the St. Helens share of the market and, to a lesser extent, the share of Crown, questionnaires were sent to every customer of St. Helens, to selected customers of Crown, and to only a very few customers of other paper companies. The infirmities of the survey, which are discussed in greater detail in Point III,

* R. 713-787, 843-1338, 1954-1966, 1990-2003, 4565-4626, 4630-4757, 4772-5103, 5154-5246.

*infra*, included other techniques of exaggeration and misreporting clearly calculated to yield gross statistical distortions favoring the Commission's position.

After a summary report of the survey findings was received in evidence, over Crown's objections, Crown was repeatedly denied the right to cross-examine Commission witnesses with respect to the statistics furnished by them in the survey (*e.g.*, R. 1442, 1458-59, 2237-38), although probable errors in their figures had been previously brought to the Commission's attention and, *after* these witnesses all testified, the Commission without their knowledge or consent altered the figures fifteen of these witnesses had furnished in the survey (see R. 4901-03). The Commission economist based his expert testimony exclusively on the survey (R. 5162-5244). Ultimately, however, the Hearing Examiner found that Crown's objections to the survey were justified and that the survey report was unreliable. He further pointed out that cross-examination and making of an intelligible record had been "greatly hampered" because Commission counsel had "strictly construed" a prohibition by the full Commission against putting into the public record any of the information furnished by reporting companies (R. 583-86).

Nevertheless, the Hearing Examiner received and later refused to strike the survey evidence because he had been instructed by the Commission itself to receive it in evidence (R. 134-35) and the Commission insisted that it be included in the record on appeal in the Court of Appeals, where it was apparently carefully examined by that Court (see A-41n.). The importance of the survey evidence to the Commission's case is shown by the fact that it was the *only* share-of-the-market evidence which the Commis-

sion adduced. Commission counsel frankly told the Commission that, without the survey, there was *no* evidence of "what comes into the market and what goes out of the market which will have to be explained in some way" and that "we are going to have to rely in a large part on [ "opinion testimony" ] unless we can use evidence of this kind." (R. 5423)

The survey covered a relatively broad line of commerce. It covered all of the kraft paper production which would be classified as Census coarse paper. In addition, it covered some sulphite paper because the Commission's economist found that this paper was used by customers interchangeably with kraft paper (R. 867). The survey also covered kraft paper classified by the Census in other categories than Census coarse paper, because the market could not be understood in a narrow context; it included the paper bags enumerated in the complaint, and also included paper towels, tagboard, can stock and linerboard (R. 915, 925, 926, 1059) because they were important products of St. Helens, even though none of these items is classified as Census coarse paper.*

Yet, even the Commission's biased survey report showed that in a market reasonably comparable to that alleged in the complaint, Crown's share of sales in the Pacific Coast states was only 30.8% as against Longview's 27.4%.**

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* The Commission economist testified: "We intended to cover all of the products where St. Helens had been a significant factor in the market." (R. 735)

** For comparability with the complaint, we have disregarded the towel sales covered by the survey because towels are not mentioned in the complaint.

St. Helens' sales were exaggerated by the survey technique to 16.2%* (CX 176, Table 1B).

Meanwhile, with respect to the line of commerce alleged in the complaint, other evidence showed much lesser importance for Crown and St. Helens. As against St. Helens' 60,000 tons of annual capacity at the time of the acquisition, the paper industry was expanding at the rate of one million tons per year (RX 92A, p. 119); the number of companies producing trade coarse paper in the west was constantly increasing (RX 86, pp. 3, 8-9); the vigor of competition was increasing substantially after the acquisition (see, *e.g.*, R. 1897-98, 2601-02, 2914; RX 96 [XVII, 5120]; RX 105 [XVII, 5293-95]; RX 87, p. 34); and by 1955, Crown's position as a western kraft paper producer, even including St. Helens, represented a smaller share of capacity than Crown's share *alone* prior to the acquisition (RX 94 [XVII, 5118]).

**(c) The Hearing Examiner's Findings**

After the close of the evidence, and faced with the fact that the evidence would not support a finding that the acquisition was unlawful with respect to the market alleged in the complaint, the Hearing Examiner found that the relevant product or "line of commerce" was the reporting

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* As just one example of how the survey was designed to exaggerate the St. Helens and Crown shares of the market: The Court of Appeals has found that St. Helens' sales of paper bags in the Pacific Coast states, in tons, were almost exactly the same as the paper bag sales of Hudson Paper Company, an eastern supplier (A-43). Yet, the survey (which was in dollars) attributed $1,531,332 of sales to St. Helens and only $83,154 to Hudson and its agent, Murray Paper Co. (CX 176, Tables 19A, 20A).

subcategory which the Census denominated "coarse paper". Measuring market power by production rather than sales of this "product", he further found that the acquisition of St. Helens had substantially lessened competition in the eleven western states.

The Hearing Examiner made no finding which would support the conclusion that the acquisition was unlawful if the line of commerce is trade coarse paper, or included paper used for *all* the different uses to which St. Helens' customers put its paper, and the evidence showed that St. Helens' production of paper for such an aggregation of uses was insignificant relative to western production of paper employed in this broadened range of uses (RX 62, pp. 19, 23, 31).

The Hearing Examiner attempted to justify his finding that Census coarse paper was the relevant product market on the irrelevant grounds that the bulk of St. Helens' production was of paper which was tabulated within this Census subcategory, and that Crown had 51.5% of the production in the eleven western states of paper classified in this Census subcategory (R. 589-90).*

Having defined the line of commerce in part by the method of finding some nameable "product" in which Crown had a significant share of production, the Hearing Examiner, in circular fashion, based his determination of illegality on the finding that, with respect to the line of commerce thus defined, Crown possessed 51.5% and St.

* The third, and inaccurate, statement made by the Hearing Examiner in justification of his finding was that the greater portion of the production of both Crown and St. Helens was classified as Census coarse paper. In fact, less than one-third of Crown's production of paper was classified as Census coarse paper (RX 62, p. 23).

Helens, 11.0%, of the production (not sales) in the eleven western state area chosen as the relevant section of the country.*

**(d) Before the Full Commission**

Faced with the economic evidence that the acquisition of St. Helens would not substantially lessen competition in any rationally defined market, the Commission affirmed the Hearing Examiner's determination that the acquisition was illegal by adopting the Hearing Examiner's narrow line of commerce definition and his misconceived "quantitative substantiality" or *per se* approach based solely on local production statistics and disregarding, both in quantity and quality, the actual pattern of sales.

The Commission felt itself compelled, however, to disavow the Hearing Examiner's reasons for selecting this narrow line of commerce (R. 612), and stated its own, asserting that "physical characteristics, markets, prices, and uses . . . distinguish [Census coarse] papers from other papers" so as to make it "a sufficiently distinct product line to be a 'line of commerce' within the meaning of Section 7" (R. 610, 612).**

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* This may be compared with the fact that, out of 443,152 tons of western production of "Census coarse paper" in 1952 (CX 168A [XIII, 4049]), according to the Ninth Circuit (Charts A and B, facing A-20) Crown and St. Helens together had total *sales* of "Census coarse paper" in the eleven western states of only 140,406 tons, or 32% of western production. The Ninth Circuit substantially overstated Crown's sales (see pages 41-43, *infra*); the correct percentage is about 19%. Moreover, no account was taken of the fact that producers in other areas of the country also sold in the west.

** The Commission was apparently using language from this Court's decision in *United States* v. *E. I. duPont de Nemours*, 351 U. S. 377. The distinction is that the Commission here was not able to support its generalized conclusion.

There was, however, no evidence whatsoever to support the line of commerce found by the Commission (or that later found by the Court of Appeals), as we demonstrate below. In fact, the experts for both the Commission and Crown testified that the actual competitive market was much broader (R. 1178-79, 5192, 5219, 4115-16).

The Commission affirmed the finding of the Hearing Examiner that the relevant "section of the country" was the eleven western states.

## The Ninth Circuit Decision

Crown petitioned the Ninth Circuit, pursuant to § 11 of the Clayton Act, to set aside the order of the Commission. The major grounds of the petition were:

(1) The Commission's decision was rendered in the context of an erroneous determination of the market because the area of effective competition included all paper of the type made by St. Helens, whether the Census classified the paper on its use-classification system as Census coarse paper or in other trade coarse paper production classifications. *United States* v. *Columbia Steel*, 334 U. S. 495, the *Cellophane* case (*United States* v. *E. I. du Pont de Nemours*, 351 U. S. 377), and the *du Pont-General Motors* case (*United States* v. *E. I. du Pont de Nemours*, 353 U. S. 586), were cited to support this contention.

The *du Pont-General Motors* case was cited for the proposition that the effect of the acquisition must be measured in a realistically determined "area of effective competition." *Columbia Steel* was cited for the proposition that, when a company produces variations of a single product on the same equipment, the area of effective competition

embraces all of these variations. The *Cellopha* case was cited for the proposition that products which are substitutable in use are within the same area of effective competition.*

(2) The Commission had not addressed itself at all to the question of competition, even in its sheerly quantitative aspects, but had limited its consideration to local production statistics, disregarding the actual distribution

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* Economic substitutability is a far more obtrusive fact here than in *Cellophane*, once the peculiar semantics of Census classification are understood. These may be considered to have the same effect as would a system speaking not of "cellophane", or of various grades of cellophane, but of "candy cellophane", "snack cellophane", "bakery cellophane", etc. (see 351 U. S. at 399). For example, "wrapping paper" as it is defined by the Census cannot be used to make paper containers because wrapping paper is defined as paper which is used as wrapping paper (RX 62, pp. 38-39). The same paper, however, if actually used to make paper containers, is classified by the Census as "containerboard" (RX 62, pp. 45-46). The Census deliberately designed its classifications so that "wrapping paper" could not be used as containerboard because that very usage would transform it into "containerboard". However, wrapping paper and containerboard are realistically interchangeable in use because paper actually made by St. Helens, even if physically identical to the last molecule, would become "wrapping paper" when used for that purpose, and would become "containerboard" when used for the latter purpose. It all depended on the nature of the business of the customer who had placed an order for the paper in question as it came off the machine, rather than on any distinctive qualities of the paper.

Even the Census statistics cannot be purged of these economic realities, for, as the Commission's expert pointed out, "some of the wrapping papers are used for converting purposes. Some of the converting papers are used for wrapping purposes" (R. 5012) and, "the Census doesn't tell a converter that he may not buy ["envelope paper"] and use it for a different purpose, and I don't think we are warranted in assuming that the mill describes the paper by two different names according to the destination [end-use] to which it moves." (R. 5041)

of sales by western producers and eastern producers both within and outside the eleven state market found by the Commission. Crown and St. Helens sold much of their paper outside the eleven state area and producers in other areas of the country sold within the eleven state area.

(3) The hearing before the Commission was so permeated by the vice of the survey evidence that a fair trial could not be and was not accorded to Crown.

(4) The Commission had ignored all of the economic evidence showing the growth of the market, the increase in numbers and market shares of Crown's competitors, the ineffectiveness of St. Helens as a competitor, and the fact that St. Helens had itself planned to shift its sale to customers whose uses of the paper would take it out of the Census coarse paper category so that, on the Census use classification system, most if not all of its production would be classified as other than Census coarse paper.

(5) Although the timberlands formerly owned by St. Helens were found not to be within the line of commerce affected by the acquisition, and the timber was not found to be necessary to the operation of the St. Helens mill, the timberlands were nevertheless included in the order of divestiture.

(6) The provision in the Commission's order that St. Helens be divested "as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of acquisition" was a condition not authorized by statute.

The Court of Appeals affirmed the Commission's order of divestiture but on grounds different from those of the Commission.

The Court of Appeals found that the line of commerce chosen by the Commission was too narrow and should include manufactured bags. It found that the Commission's eleven state section of the country was too broad and that the geographic market area should be limited to the three Pacific Coast states. The Court also found the Commission's grounds of decision to be erroneous in that the Commission relied on local production statistics without considering the pattern of actual sales.

The Court of Appeals nevertheless proceeded to address itself to a question never considered by the Commission, *i.e.*, whether the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the sale of products in the three Pacific Coast states in the line of commerce consisting of paper classified as Census coarse paper plus manufactured bags.*

This the Court did despite its finding that the record made before the Commission was "very unsatisfactory" and "most unsatisfactory and quite fragmentary" with respect to shares of the market (A-38, 39).** The Court's purpose, however, led it to search the record, which it read in the light of its own intricate interpretive and factual assumptions requiring many pages of text for their exposition (see, *e.g.*, A-39 through 44, A-71 through 75) which it used as the basis of its own "estimate" (A-44) of the shares of the market of Crown, St. Helens and their com-

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* According to the Court of Appeals' statistics, the addition of bags to the line of commerce increased the total quantity of sales being considered by about 35% (Chart C facing A-39, A-40, A-45, A-80).

** This may account for the 17-month interval between the argument of the petition for review and the Court's decision.

petitors. It estimated that Crown had 50.53% of sales in the market and that St. Helens had 10.81% (A-45). On petition for rehearing, Crown pointed out that the Court had made patent errors as well as unjustified assumptions without support in the record. The Court, admitting one substantial error (A-80), but assuming that this and other corrections would not reduce Crown's share of the market below about 35%, denied the petition for rehearing on the ground that any such error would not affect its conclusion that the acquisition was illegal (A-79). (Crown's petition for rehearing pointed out that the proper figure for its share of sales was probably below 29%, as against the Court's original estimate of over 50%.)

With respect to *Columbia Steel* and the *Cellophane* case, the Court of Appeals stated that these cases were irrelevant because they were decisions under the Sherman Act and therefore inapplicable to proceedings under § 7 of the Clayton Act (A-28). The Court did not find, and did not even suggest, that the acquisition would be illegal if competition were analyzed in accordance with the holdings of this Court in those cases or of the Third Circuit in *Erie Sand and Gravel* v. *FTC*, 291 F. 2d 279 (1961). Nothing in the Ninth Circuit's opinions indicates that it would have affirmed if the economic considerations which this Court has found applicable in defining the relevant market in Sherman Act cases are also applicable to the definition of the relevant market in a § 7 case ("the area of effective competition" as it was described by this Court in the *duPont-General Motors* case).

The objections to the conduct of the trial were rejected by the Court of Appeals on the ground that the Commis

sion stated that it had not relied upon the survey evidence and that, despite its being printed for use of the Court of Appeals, the Court of Appeals did not rely upon it (A-65, 66). The opinion, however, indicated that the Court of Appeals had at least carefully analyzed this improper evidence (see A-41n.). The objections to the inclusion of timberlands in the order of divestiture, and the form of the order itself, were not discussed at all by the Court of Appeals.

Thus, all of the objections to the Commission's decision apply equally to the decision of the Court of Appeals. The Court of Appeals' decision, however, is objectionable on an additional ground. Although affirming the conclusion that the effect of the acquisition may be substantially to lessen competition, the Court reached that decision only after rejecting every one of the Commission's main grounds for decision, *i.e.*, the definition of the line of commerce, the definition of the section of the country, the Commission's reliance on production statistics rather than sales, and the Commission's related and insupportable finding that sales in the western states by mills located outside that area were "relatively insignificant". This raises a very substantial question whether the Court of Appeals correctly stated in denying rehearing that it was "but adopting and reenforcing the *ratio decidendi* of the Commission" (A-78), and whether its affirmance may be considered to be in conformance with this Court's decisions in *SEC v. Chenery Corp.*, 318 U. S. 80 and 332 U. S. 194.

## ARGUMENT

Review on writ of certiorari is requested for reasons which properly invoke this Court's discretion to grant the writ. Important questions of Federal law are presented which have not been, but should be, settled by this Court. The Ninth Circuit has rendered a decision in conflict with a decision of the Third Circuit on two of the questions presented. The Ninth Circuit has also decided Federal questions in a way in conflict with applicable decisions of this Court. Finally, the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by an administrative agency as to call for exercise of this Court's power of supervision.

### POINT I.

**The decision of the Ninth Circuit is in conflict with the *Chenery* decisions of this Court and the decision of the Third Circuit in *Erie Sand and Gravel*.**

A proceeding under § 7 of the Clayton Act requires first a determination of the relevant market or area of effective competition, and then consideration of the facts relevant to the question whether the effect of an acquisition may be substantially to lessen competition in *that* market. *United States* v. *E. I. du Pont de Nemours*, 353 U. S. 586 (the *du Pont-General Motors* case); *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F. 2d 524 (2d Cir. 1958). It follows that a determination by the Federal Trade Commission cannot be affirmed if the

reviewing court holds that the Commission addressed itself to the wrong market and then used the wrong considerations in determining whether the acquisition had the effects proscribed by § 7. *SEC* v. *Chenery Corp.*, 318 U. S. 80 and 332 U. S. 194.

The Ninth Circuit here decided that the Commission had misconceived the relevant line of commerce and that the correct line of commerce should be one which is derived by a different theory. While the Commission had rationalized the product market on the basis of purported distinctions in "physical characteristics, markets, prices, and uses" (R. 610), the Ninth Circuit said that

> "it is manifest that generally speaking we must find the relevant market product-wise in those products in which St. Helens was a significant factor before the merger." (A-18)

Rather than remanding to the Commission to apply this new theory, the Ninth Circuit itself applied the theory and added manufactured bags to the Commission's "Census coarse paper" line of commerce, thereby increasing the dimensions of the market in terms of sales by approximately 35% and materially shifting the relative participation in the market by Crown, St. Helens and their competitors.

The Ninth Circuit also found that the Commission had addressed itself to the wrong geographic area of the country and applied a theory different from the Commission's for determining the proper geographic market. Whereas the Commission had rationalized the market selected on the grounds that the eleven western states were the "greater natural market" for western producers and were the area

where both Crown and St. Helens made the majority of their sales of Census coarse paper (R. 612), the Ninth Circuit stated that the relevant geographic market must be confined to "those states that as between these two corporations the most active and extensive competition occurred" (A-35). Using this different concept of market definition, the Ninth Circuit held that the relevant section of the country was not the eleven state area found by the Commission but only the three Pacific Coast states.

Turning next to the question whether the effect of the acquisition may be substantially to lessen competition in this new market, not only did the Court address itself to a market different from that considered by the Commission, but the Commission's standards for determining the effect of the acquisition were considered and expressly rejected. The Commission had relied upon local production statistics, disregarding sales in the market. With respect to sales into the market by producers in other areas of the country, the Commission had contented itself with the unsupported observation that those imports were "relatively insignificant".

The Ninth Circuit properly rejected the finding that imports into the market were "relatively insignificant" (A-43). The Ninth Circuit also rejected local production statistics as the basis for decision and properly held that sales were a far more important indication of competition than local production statistics (A-19, 20). The Court was confronted, however, with the fact that the Commission had made no findings whatsoever with respect to the shares of sales in any market by Crown, St. Helens or their competitors.

The Ninth Circuit nevertheless undertook its own detailed search of the record, from which it made assumptions and estimates as to the market shares of Crown, St. Helens and other sellers in the market, preempting determination by the Commission as to whether, on the new rationale adopted by the Court of Appeals, the Commission would adhere to its original result, or whether it would find it necessary to take additional evidence.

The Ninth Circuit frankly admitted that its share of the market statistics were based upon assumption and estimate (*e.g.*, A-37, 44, 74). Its share of the market findings were made in camera, and were based on evidence which the Ninth Circuit itself described as "very unsatisfactory" and "fragmentary" (A-38, 39), and without any opportunity given to Crown to explain or to point out other evidence which should be taken into account. In so doing, the Ninth Circuit forgot a whole class of sellers of manufactured bags (as it admitted in its opinion denying rehearing (A-80)), and fell into other even more serious errors.*

In its petition for rehearing, Crown pointed out that even the fragmentary record before the Commission, properly read, indicated that Crown's share of the market should be reduced to less than three-fifths of the Court's original estimate. The Commission asked and was given 75 days to reply to Crown's detailed demonstration of these

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* As one of several examples, the Ninth Circuit included as "sales" the intra-corporate transfers of paper by Crown to its converting divisions, while *excluding* similar intra-corporate transfers by Crown's competitors to their converting divisions (A-71, 74; CX 168A [XIII, 4049]). This resulted in the inclusion of 31,953 tons of pseudo sales by Crown while excluding an exactly comparable 39,801 tons for St. Regis and 19,879 tons for Longview, resulting in a very substantial distortion in the Court's estimated shares of the market.

errors and, in its reply, contradicted not a single one of them.*

If, having decided that share of the market findings were required, the Court had remanded the matter to the Commission, counsel for the Commission and for Crown could have participated in argument as to what the record disclosed. In view of the admission by Commission counsel that apart from the now-discredited survey he had no share of the market evidence (R. 5423) and in view of the statements of the Ninth Circuit that the market-share evidence was unsatisfactory and fragmentary, a remand to the Commission would have permitted additional evidence so that these indispensable facts could be determined from evidence rather than on the basis of estimates derived from assumption and conjecture.

Moreover, on the basis of the standard used by the Ninth Circuit for determining the proper line of commerce—those products in which St. Helens was a significant factor before the merger—the Commission would probably have included different items than did the Ninth Circuit. For example, the Ninth Circuit included "gumming paper" on the basis of 695 tons of sales by St. Helens, but excluded towels, of which St. Helens sold 1,177 tons. The Ninth Circuit included "bag paper", of which St. Helens sold 710 tons, but excluded "tagboard", of which St. Helens sold 1,848 tons. The Ninth Circuit included "waxing paper", of which St. Helens sold 1,567 tons, while excluding "can

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* The Ninth Circuit has transmitted to the Clerk of this Court copies of the petition for rehearing and the Commission's answering brief, as well as the other briefs below. The petition for rehearing furnishes the particulars of the errors referred to.

converting" paper, of which St. Helens sold 1,844 tons.* (See A-21, and Chart B facing A-20. See also A-31.)

Furthermore, on the Ninth Circuit's new rationale for defining the relevant section of the country—"those states that as between the two corporations the most active and extensive competition occurred"—it is far from obvious that the Commission would have been impelled to the result reached by the Court. The Commission would have very great difficulty, for example, in excluding Texas, where the Court found that Crown sold "a very substantial quantity of Census coarse papers" and St. Helens had substantial sales (A-34); the quantities would be increased if bags are added.

The foregoing is sufficient to demonstrate that the affirmance by the Court of Appeals was impermissible under this Court's decisions in the *Chenery* cases. In *Chenery*, the Securities and Exchange Commission in a reorganization of a holding company ordered that preferred stock acquired by officers and directors while their company's plans for reorganization were before the Commission could not be converted into stock of the reorganized company. The Commission had made the necessary statutory findings that to permit these shares to be converted would be "detrimental to the public interest or the interest of investors or consumers" and that the distribution contemplated by the plan was "fair and equitable", the standards set forth in the Public Utility Holding Act of 1935. However, the basis of the Commission's action was its determination that the acquisition of such preferred stock had violated an equita-

* Using the same test as that announced by the Court of Appeals (see R. 735) the Commission's economist included towels, tagboard, can stock and linerboard in "the market" (see R. 915, 925, 926, 1059).

ble "duty of fair dealing" established by judicial decisions. Finding that this basis of determination could not be sustained, this Court refused to affirm on alternative bases which were suggested, holding that the Commission's action "must be measured by what the Commission did, not by what it might have done" (318 U. S. at 93-94), and that it was not for the reviewing court to determine independently whether there was any alternative basis to support the Commission's action. The proceeding was therefore remanded to the Commission.

When *Chenery* was called to the attention of the Ninth Circuit by petition for rehearing, the petition was denied with a statement in the opinion that the reference to *Chenery* "discloses a misunderstanding of the import of our decision" and that "we were but adopting and reenforcing the *ratio decidendi* of the Commission" (A-77, 78). In explanation, the Court stated:

> ". . . we have in no manner disapproved or rejected the Commission's bases for its decision that 'the effect of this acquisition may be substantially to lessen competition or tend to create a monopoly', that at the time of acquisition Crown had 'a predominant share of the market', that by the acquisition Crown increased significantly its size in the market 'in which it already had a commanding lead', and that the result was the removal from the supplier market of 'an important, fully integrated competitor' with 'fully developed sales outlets to the trade,'" (*Ibid.*)

This statement of the Court of Appeals, however, says no more than that it approved the ultimate conclusion of the Commission. It ignores the fact that the Court had dis-

approved every major ground for the Commission's decision. In an action under § 7, the grounds of decision include both the initial determination of the relevant market and the basis upon which it is determined whether the effect of the acquisition may substantially lessen competition in that market. The Court's determination was not addressed to the same market as had been considered by the Commission, nor was it based upon the same evidence or inferences from the evidence as were relied upon by the Commission. The Commission found an illegal effect in one market from consideration of local shares of production; the Court of Appeals affirmed because, relying upon shares of sales rather than production, it found an illegal effect in a different market.

The Court of Appeals treated the *Chenery* decisions in a fashion which would rob them of their effect in delineating the proper roles of Federal agencies and reviewing courts, and ignored the holding of this Court that:

> "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (318 U. S. at 95)

The language of this Court in the second *Chenery* decision also reads squarely upon the present situation:

> "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those

> grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." (332 U. S., at 196)

Wholly misapprehending the import of the *Chenery* decisions, the Ninth Circuit affirmed here under the most impermissible of circumstances.

The Commission had considered and *rejected* a market which included paper bags, even though bags had been prominent in the market defined by the Commission's own complaint. Nevertheless, the Court based its affirmance of the Commission result on a market defined to include bags. In so doing, the Court adopted the rationale of the Hearing Examiner that the line of commerce should be defined by those products in which St. Helens was a significant factor, although the Commission had rejected this rationale. Moreover, the Commission had considered and rejected the contention that imports from other parts of the country were substantial, expressly finding that they were "relatively insignificant", and had gone on to base its decision exclusively on production statistics. The Ninth Circuit, however, affirmed the Commission's result despite its rejection of the Commission's reliance on production figures and its rejection of the Commission's finding on imports.

Since the principal grounds of the Court's decision were thus not merely different than those relied upon by the Commission, but were actually considered and *rejected* by the Commission, it appears on the present posture of

things more probable than not that the Commission would have found itself unable to reach the same result on the grounds now put forward by the Court.

Within a few days of the decision of the Ninth Circuit in this case, the Third Circuit rendered a squarely conflicting decision in *Erie Sand and Gravel Co.* v. *FTC*, 291 F. 2d 279 (1961).

*Erie Sand and Gravel* was a proceeding by the Commission under § 7 of the Clayton Act on an acquisition involving companies supplying sand for use in ready-mix concrete. The Commission held the relevant line of commerce to be lake sand—sand taken from the bottom of Lake Erie—and the relevant section of the country to consist of a strip running along the southern shore of Lake Erie from Buffalo to Sandusky and extending 12 miles inland. The Third Circuit pointed out that sand taken from the banks of nearby rivers and pits, referred to as "pit or bank sand", was interchangeable in use with "lake sand". The Court thereupon reversed and remanded to the Commission for determination whether lake sand and pit and bank sand should be considered a single line of commerce in the relevant geographic market, refusing to determine for itself whether the market could be restricted, as the Commission then urged, to discrete semicircles along the south bank of Lake Erie where it was thought that lake sand was primarily used because of lower freight charges.* The Third

* Contrast the Ninth Circuit's attempt to justify its choice of the Pacific Coast states market in part on the ground that:

> "The availability of alternative water transportation, while little availed of, has operated to furnish *peculiarly favorable land carrier rates.*" (A. 35; italics supplied. It should be noted that the Court's statement was without evidentiary citation.)

Circuit left it to the Commission to make the initial determination of the proper line of commerce, section of the country and shares of the market after considering the functional interchangeability which the Commission had previously disregarded and such other facts as differences in the cost of production and transportation. The Court stated:

> "As a reviewing court we cannot properly substitute the government's present view that the relevant market area is a series of separated small semicircles for the finding of the Commission below that the relevant section of the country is a much more inclusive contiguous area. Yet, if that larger section is used to define the relevant market, as it must be on the present record, then the Commission was clearly wrong in ignoring the large sales of pit and bank sand within that area in its determination of the effect of the merger in question on competition.
>
> "On the present record it could be found that even after the merger Erie's production and sale of sand represented substantially less than one-half of the total commerce in concrete sand within this area. Perhaps even then it would be concluded that the merger had such an actual or potential effect in lessening competition that it should be adjudged a violation of Section 7. But while that conclusion may well be permissible, it is far from obvious. Experts might possibly differ in their judgment of the matter. Therefore, it is appropriate that the Commission be given an opportunity to reconsider the case, correcting the basic factual errors it has made, first, in differentiating lake sand from pit and bank sand functionally and, second, in overlooking the large amount of pit and bank

sand sold for concrete making within the twelve mile strip." (291 F. 2d at 283)

The decision of the Third Circuit, in accord with this Court's decisions in *Chenery*, and in a situation strikingly like the instant case, recognized the fundamental responsibility of the Federal Trade Commission in the decision-making process. As in *Erie Sand and Gravel*, the Ninth Circuit found here that the grounds upon which the Commission acted were not supportable. The Ninth Circuit should similarly have remanded to the Commission, particularly in view of the unsatisfactory evidence on issues found by the Court of Appeals to be crucial.*

Even were the *Chenery* decisions not applicable here, the Ninth Circuit has so far misconceived its function and failed in the fair assessment of the record as to require an exercise of this Court's supervisory powers. Under the rule stated in *Universal Camera Corp. v. NLRB*, 340 U. S. 474 and *FTC v. Standard Oil Co.*, 355 U. S. 396, the Commission itself could not possibly have made findings duplicating the estimates made by the Ninth Circuit here and had them sustained; clearly, if a Court of Appeals is to be allowed to venture into such fact-finding areas at all, those cases will not permit that Court to venture further on a given record than the administrative body might. The test of any "findings" by the Courts of Appeal must therefore be the same: whether they are supported by substantial evidence on the record considered as a whole. (It might be noted that where the appellate court makes findings such as those here the only body available to review them

* The Commission did not petition for certiorari to review *Erie Sand and Gravel*.

under the substantial-evidence test must be this Court, an added fact showing the wisdom of *Chenery*, whose application in the first place would keep this Court's role on review of factual findings in proceedings initiated before administrative agencies always that of a Court of second resort.)

We have already demonstrated one major error committed by the Court of Appeals through treating inconsistently the transfer of paper by various companies to their own converting operations (see p. 32n., *supra*). The Ninth Circuit also mistakenly attributed to Crown 12,437 tons of sales of "other-converting" paper, although Crown only produced 2,228 tons (Chart A facing A-20; CX 168A [XIII, 4049]). By mistake, the Court included 6,264 tons of Crown's sales twice, once as shipping sack paper and once as bag paper (see Chart A facing A-20, where the "gov't" total is 6,264 tons less than the Court's for these two items).

The Court very substantially underestimated the bag sales of Longview Fibre Co., as can be seen by comparing the Commission's claimed dollar sales of manufactured bags by Longview and St. Helens in the Pacific Coast states in the 18 months from January 1, 1952 through June 30, 1953 (CX 170, Tables 19A-1, 20A-1) with the Ninth Circuit's estimates of the tonnage of bags sold in the same area in 1952:

| | Dollar Sales | Tons |
|---|---|---|
| Longview .... | 3,300,028 | 4,492.54 |
| St. Helens .... | 1,531,332 | 6,913.32 |

Mere inspection of the respective dollar-ton ratios demonstrates the impossibility of the Court's tonnage estimate for Longview.

The Court of Appeals substantially overestimated Crown's bag sales. Crown consumed in the manufacture of bags only 54,910 tons of paper; it sold a very substantial percentage of its bags outside the eleven western states and its sales included over 207,000 cases of "impregnated bags". Yet the Court of Appeals estimated Crown's sales in the eleven western states, *excluding* impregnated bags and sales in other areas, at 55,955 tons.*

The Ninth Circuit's estimates as to the amount of sales represented by imports from other parts of the country were completely speculative. The Court attempted to develop import statistics for (1) wrapping paper, (2) shipping sack paper, (3) bag paper, (4) envelope paper, (5) gumming paper, (6) waxing paper, (7) "other converting" paper, (8) asphalting paper, and (9) manufactured bags. Yet, except for wrapping paper and bags, there is *literally no evidence* of the amount of paper shipped into the Pacific Coast states from mills located in other areas of the coun-

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* In response to the question where the Court had found its figures for Crown's tonnage sales of bags—a figure substantially higher than was claimed by the Commission itself—the Court stated that Crown's sales were taken from various pages from 2353 to 2378 of Exhibit Vol. IV, and that the totals were "computed with the aid of an adding machine." (A-79n.) We suggest that this Court look at those pages because there is nothing there which would indicate tonnage sales; all of the figures are in bales or cases. A review of Chart A in the Ninth Circuit's original opinion (facing A-20) discloses that the Court of Appeals did not obtain its tonnage figures from the record but applied a conversion factor of 32.52 bales per ton. The Court of Appeals is silent as to the basis for this conversion factor.

try. An I.C.C. sample showed that 6,700 tons of bags were shipped to the Pacific Coast states by carload rail shipments from the south and east (CX 86 through 91 [VIII-IX. 3083-3267]), and other evidence showed that Hudson Paper Company shipped an additional 7,000 tons of bags by water (A-43). The Ninth Circuit inexplicably used only the rail shipments in finding that "12 percent of the bags came from other sources" than western mills (A-40), and ignored the water shipments recited by the Court itself.

Another I.C.C. sample showed that average shipments of wrapping paper into the Pacific Coast states from other areas of the country were 20,940 tons (CX 86 through 91, *supra*). Rejecting this figure, the Court assumed that imports of wrapping paper represented only 10.9% of total wrapping paper sales in the Pacific Coast states (A-40), or only about 6,000 tons. Then, completely ignoring the bag imports, the Ninth Circuit states that "*if it be assumed* that the percentages for wrapping paper, approximately 11 percent [or less than one third in tons what the Commission's own evidence showed], *would be fairly representative* of the percentages of other of these coarse papers, then we *might have an indication* that 11 percent of *all* the relevant paper products sold in the Pacific coast states were from imports." (A-41; italics supplied)

The Court's language is tentative to a remarkable degree, as well it might be: It had made a purely speculative finding—on the basis of wrapping paper statistics it considered wrong—for seven items for which there was admittedly no evidence whatsoever, and for bags, for which there was evidence recited by the Court showing much greater imports. A more improper basis for decision could hardly be imagined.

## POINT II.

**The decision of the Ninth Circuit is in conflict with the decisions of this Court in *Columbia Steel*, the *Cellophane* case and *Tampa Electric*.**

*Columbia Steel** held that where several variations of a product can be and are interchangeably made on the same production equipment, all of them must be considered part of the same market. St. Helens' paper machines not only could but did make paper which was classified under the Census use-classification system as Census coarse paper and in other classifications for reporting trade coarse paper production. If paper which St. Helens made for these other uses were added to the line of commerce, St. Helens' share of the market would be so insignificant that the Commission has never claimed that the acquisition would violate § 7.

The *Cellophane*** case held that where several products are interchangeable in use, they all form part of a single market. The paper made by St. Helens is interchangeable for uses which would result in their classification as Census coarse paper and in other Census classifications. The Census classification system does not distinguish between the characteristics of the paper but only between intended uses. Again, if the rationale of the *Cellophane* case were applied here, the Commission has never claimed that the acquisition would violate § 7.

*Columbia Steel* and the *Cellophane* case were cited to the Court of Appeals in Crown's initial brief, but were

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* *United States* v. *Columbia Steel Co.*, 334 U. S. 495.

** *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377.

expressly held to be "not relevant here" (A-28) because they had arisen under the Sherman Act. In its petition for rehearing, Crown pointed out that this Court had subsequently specifically referred to *Columbia Steel* in discussing the proper definition of a market in *Tampa Electric*,* involving § 3 of the Clayton Act; § 3 contains the same market-defining language as § 7—"in any line of commerce in any section of the country".** The Ninth Circuit, denying rehearing, again held that *Columbia Steel* "is not pertinent here". (A-82)

In *Tampa Electric*, moreover, this Court rejected an attempt to define the relevant geographic market solely by reference to where a single company had major sales. If Texas and other states where Crown and St. Helens regularly competed are included in the relevant section of the country, the Commission has never claimed that St. Helens was a sufficiently substantial competitor so that its acquisition could substantially lessen competition.

The Commission thus has never claimed, and the Ninth Circuit does not suggest, that the acquisition of St. Helens would violate § 7 if the market were defined according to the principles of *Columbia Steel* and the *Cellophane* case. Trade coarse paper would be the relevant market according to these decisions, and local western production was over four times the production which the Census classified as Census coarse paper (RX 62, pp. 19, 23, 28-33). St. Helens

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* *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320.

** *Columbia Steel* is an even more compelling precedent in a § 7 case than it was in *Tampa Electric*, a § 3 case; this Court stated that, had *Columbia Steel* involved an acquisition of stock instead of assets, it would have been a § 7 case (334 U. S. at 507 n.).

share of local production would be not more than 3.1% in the enlarged market thus arrived at (*ibid.*), and there are substantial interregional shipments which would further reduce St. Helens' share of sales in the local market far below its share of production. Crown's share of local production in the market would be not more than 23.1% (*ibid.*), and again its share of sales would be very greatly reduced because of these interregional shipments. Nationally, Crown had only 2.6% of trade coarse paper production and St. Helens had an insignificant .3% (*ibid.*).

In *Columbia Steel*, this Court rejected a Government argument which, like the decision of the Ninth Circuit here, would gerrymander the line of commerce by choosing the variations of a company's product which most exaggerate its market position. In *Columbia Steel*, the Government attempted to limit the relevant market to shapes and plates, although the record suggested that rolled steel producers could make other rolled steel products interchangeably with shapes and plates. This Court pointed out that there was

> " . . . little indication as to the propriety of considering plates and shapes as a market distinct from other rolled steel products. *If rolled steel producers can make other products as easily as plates and shapes, then the effect of the removal of Consolidated's demand for plates and shapes must be measured not against the market for plates and shapes alone, but for all comparable rolled products.* The record suggests, but does not conclusively indicate, that rolled steel producers can make other products interchangeably with shapes and plates, and that therefore we should not measure the potential injury to competition by considering the total demand

> for shapes and plates alone, but rather compare Consolidated's demand for rolled steel products with the demand for all comparable rolled steel products in the Consolidated marketing area." (334 U. S. at 510-11; italics added)

It then held:

> "In this case and on this record we have circumstances that strongly indicate to us that rolled steel production and consumption . . . is the competitive . . . product for consideration." (334 U. S. at 511)

The similarity of *Columbia Steel* and the present case requires only the substitution in the holding of the words "Census coarse paper" and "trade coarse paper" for "shapes and plates" and "rolled steel products", respectively, bearing in mind that here the production flexibility is not merely "strongly indicated" but has been found as a fact by the Commission. The Hearing Examiner has found—and the Commission affirmed—that St. Helens and the other paper mills readily can and do produce interchangeably trade coarse paper classified as "Census coarse paper" and trade coarse paper classified in other Census subcategories. (See, e.g., Findings 52, 53; R. 571-72.)

The holding of the Ninth Circuit that the relevant market includes paper used to make bags, waxed paper and a few other converted paper products (plus manufactured bags), and excludes paper used to make cartons, tags and other coarse paper products, has no more validity than would a contention in *Columbia Steel* that the relevant market included rolled steel used to make tractors, school buses and washing machines, but excluded rolled steel used to make trucks and refrigerators.

*Columbia Steel*, the *Cellophane* case and *Tampa Electric* held that the relevant market or "area of effective competition" must be determined consistently with industry economics. None of the reasons offered by the Court of Appeals even remotely satisfies the requirements of these cases.

It has been shown above that the Ninth Circuit could not, as it attempted, disregard production flexibility and make its market definition turn on "those products in which St. Helens was a significant factor before the merger" (A-18; even this erroneous test the Court misapplied, as shown at pp. 33-34, *supra*). This Court, moreover, has made it clear that Census classifications do not in themselves determine relevant markets, and it is not probative for the Ninth Circuit to justify its market determination merely by the further statement that "The Census classification cannot be meaningless" (A-27).*

The Ninth Circuit's refusal to consider or test facts concerning product interchangeability under the terms of the

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* The inappropriateness of taking a small part of an industry, represented by a Census statistical subcategory such as "Census coarse paper", as a line of commerce was pointed out in *Concentration in American Industry*, a Report of the Subcommittee on Antitrust and Monopoly to the Senate Committee on the Judiciary, 85th Cong., 1st Sess. (1957), which states (p. 5):

> "9. The classifications of industries and products for which concentration measures are used in this report are those used in the Census of Manufactures. These classifications were developed over a period of years to serve the general purposes of the census and other governmental statistics. Although the basic data are extremely useful and widely used for a variety of purposes in marketing analysis, *the classifications were not designed to establish categories necessarily denoting coherent or relevant markets in the true competitive sense, or to provide a basis for measuring market power.* . . ." (Italics supplied.)

*Cellophane* decision renders its remaining attempts at justification equally nugatory. Thus the decisions of this Court also demonstrate the irrelevance of what the Ninth Circuit stated as "Perhaps the most persuasive fact", *i.e.*, that "no one . . . has any difficulty in distinguishing one type of paper from the other." (A-27)* But no one has any trouble distinguishing cellophane from waxed paper, which this Court found in the *Cellophane* case are sold in the same market, and although no one is unable to distinguish oil, coal and gas, this Court in *Tampa Electric* left open on the facts whether these distinguishable products were part of a single "line of commerce" under the Clayton Act. Similarly unsupportable is the Ninth Circuit's uncritical acceptance of the Commission's mere assertion that "physical characteristics, markets, prices, and uses . . . distinguish [Census coarse] papers from all other papers" (R. 610) sufficiently to meet the § 7 requirements for defining a line of commerce. The physical characteristics point has been sufficiently commented upon. There is, as to the other three factors named, as much difference among the papers classified under Census coarse paper as there is between such

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* This statement is not supported by any evidence. There is no evidence that anyone, for example, can distinguish 78-pound linerboard from 78-pound wrapping paper; they are distinguished by the Census only after their use is known. Samples of the various papers produced by St. Helens (RX 42) and on a single Crown paper machine (RX 8) are part of the record before this Court and even a cursory inspection of these samples demonstrates that physical characteristics do not distinguish paper classified by the Census as Census coarse paper from paper otherwise classified. Compare, for example, RX 42-Z-63, 64 and 66; 67, 68, 69 and 70; 99, 100 and 102; or RX 8-Z-6 and 7; 19 and 20. Of course, when the Court of Appeals added manufactured bags to the line of commerce, it made its statement completely meaningless.

papers and papers classified in other Census categories; indeed, some of these other uses (such as toweling and "special industrial paper") were once included in the Census coarse paper classification itself and removed for unknown reasons (R. 1056, 4564). The Commission's assertion, in any event, became irrelevant with the addition to the line of commerce of manufactured bags.

The Ninth Circuit's holding that *Cellophane* is not applicable in a § 7 proceeding is also in conflict with the decisions of the Second and Third Circuits. *Erie Sand and Gravel, supra; American Crystal Sugar, supra.** The square conflict between the present case and *Erie Sand and Gravel* on the applicability of the *Cellophane* test has been recognized by the commentators. See Mann & Lewyn, *The Relevant Market Under Section 7 of the Clayton Act: Two New Cases—Two Different Views*, 47 VA. L. REV. 1014 (1961); the same authors in 36 N. Y. U. L. REV. 1113 (1961); and BNA Antitrust & Trade Reg. Rep., Jan. 30, 1962, p. A-6.

In Handler & Robinson, *A Decade of Administration of the Cellar-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 648 (1961), the authors, anticipating the specific problem shortly to arise in the *Crown* and *Erie Sand and Gravel* decisions, stated:

> "The very language of *Cellophane* and *duPont-General Motors* argues against drawing different

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* *Cellophane* has been cited and applied by District Courts in § 7 cases in *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 184 (S.D.N.Y., 1960), and *United States* v. *Philadelphia National Bank*, 5 CCH Trade Reg. Rep. ¶ 70,197, at p. 75,714 (E.D. Pa. 1962).

legal doctrines from them. When *du Pont-General Motors* inquires whether the products have 'sufficient peculiar characteristics and uses,' it is virtually paralleling *Cellophane's* 'how different from one another are the offered commodities in character or use.' . . .

"Moreover, aside from semantics, there is compelling reason for applying the same test of market definition whether the complaint be founded on the Sherman or Clayton Act. The frame of reference for what is essentially an inquiry into the facts must be constant. What differs is the substantive standard of legality. Under the Sherman Act, the question is whether the challenged conduct actually restrains trade in the defined market. Under the Clayton Act, it is enough to show a reasonable probability that competition will be substantially lessened in that market. The anticompetitive impact on the market must be greater if the conduct is to rise to the level of a Sherman Act infraction. But the market is not different. Its boundaries correspond with economic realities, not artificial and shifting legal conceptions."

The line of commerce found by the Ninth Circuit does not "correspond with economic realities" and admittedly ignores the standards of economic analysis held pertinent in Sherman Act cases for determining a market. It was not the line of commerce alleged in the complaint. It was a fragment of the line of commerce covered by the Commission's survey. The expert witnesses for both the Commission and Crown agreed that it did not constitute a separate market (R. 1178-79, 5192, 5219, 4115-16). Because of the Court of Appeals' addition of manufactured bags, which substantially increased the Court's estimate of

Crown's share of the market, it is not even a line of commerce based upon a Census classification; the Census coarse paper classification does not include manufactured bags.

The basic rationale of the Ninth Circuit can only be that the relevant market is defined solely in terms of what would yield the largest market shares for the acquiring and acquired companies; that alone explains the inclusion of paper used to make bags, gummed tape and waxed paper while excluding paper used for other purposes which constituted larger portions of St. Helens' production (see pp. 33-34, *supra*), and the exclusion of Texas, a substantial market for Crown and St. Helens.* The decision that Crown's acquisition of St. Helens may substantially lessen competition can be supported only by applying a magnifying glass to a small segment of the market, contrary to this Court's decisions in *Columbia Steel*, *Cellophane* and *Tampa Electric*.**

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* In *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163 (3d Cir. 1953), *cert. denied*, 346 U. S. 901, a § 7 case cited with approval by this Court in *duPont-General Motors*, the "western" market area was found to include Texas. In *Columbia Steel*, the "western" market was found to include Texas and Louisiana.

** The distinction between this magnifying glass approach and the holdings of this Court may be demonstrated by two examples: The Ninth Circuit, through its failure to apply *Columbia Steel*, attributed significance to the fact that in 1952 St. Helens produced 9.6% of the locally-produced paper used to make bags, mistaking St. Helens' 9.6% of production of paper used to make bags as representing St. Helens' share of the "production capacities of various companies" (A-50 & 50n.) The Court thus magnified St. Helens' importance enormously. The significant facts are not the local production statistics but the Commission's explicit finding that all 81 Fourdrinier machines in the west pro-

## POINT III.

**The Ninth Circuit failed to pass upon Crown's contention that it was not accorded a fair trial before the Commission and that the proceedings failed to satisfy constitutional requirements of due process.**

The conduct of the proceedings before the Commission necessarily resulted in evidence which, as the Ninth Circuit found, was "very unsatisfactory" and "most unsatisfactory and quite fragmentary" (A-38, 39). The major factors contributing to this result were the admission into evidence of a purported summary of a secret *ex parte* mail order survey, which violated every rule of due process, and the Commission's persistence in conducting a trial in the dark.

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ducing paper and paperboard can make 40-pound paper, the most common weight of bag paper (Finding 53, R. 571-72), and the uncontradicted evidence that as of October 1, 1955, these 81 machines (including 5 on order or announced) had the capacity to produce 7,870 tons of bag paper *every day* (RX 87, p. 34). St. Helens' 1952 production was at the rate of only 31 tons per day (10,834 tons divided by 350 days), or 4/10ths of 1% of western capacity. When acquired by Crown in 1953, the two St. Helens machines had a capacity of 180 tons per day (R. 558) or only slightly over 2% of these 7,870 tons of capacity. This 2% represents St. Helens' real share of local capacity; the share of the market in which it actually competed would also reflect the fact that eastern and southern mills have capacity which they devote to sales all over the country.

Another indication that the Ninth Circuit's market definition is an unnatural one is that St. Helens would soon have removed itself from competition in the line of commerce found. The president of St. Helens stated that the rehabilitation program was designed in part at least to permit St. Helens to get away from the "cat and dog business" it tended to get (RX 24 [XVI, 4095]). St. Helens was probably not making any money on its sales of wrapping paper (R. 1844-45). Its shipping sack paper customers had become unattractive to St. Helens and it was reducing and planned to continue to reduce its sales to shipping

It is not surprising that the evidence is unsatisfactory in view of the fact that the Commission steadfastly refused to tell Crown what it claimed to be the relevant line of commerce which was allegedly affected by the acquisition. Thus, when the trial was already well along and counsel for Crown reiterated the request that it be advised of what the Commission claimed to be the relevant line of commerce (see R. 709, 782-83, 939-42, 1178-85), Commission counsel stated, with the approval of the Hearing Examiner, that Crown would be advised of that contention in the Commission's decision after the close of the hearing (R. 1185). This conduct, which alone should have been sufficient ground for reversal, created a situation wholly incompatible with a fair trial and calculated to produce an unsatisfactory record. As *dul'out-*

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sack converters (R. 2264-66, 2296-97). Two-thirds of St. Helens' total production was unbleached paper and St. Helens planned to stop making unbleached paper (R. 2180-81). St. Helens in fact planned to seek new customers whose uses of the paper would cause the Census to classify it as paperboard and special industrial paper (see R. 1844-45, 2180-81, 2265-66, 2296-97), rather than as Census coarse paper. It also planned to produce white envelope paper, but the record is unclear whether this would be classified as Census coarse paper or fine paper (RX 22 [XVI, 4676]). The discontinuance of the manufacture of unbleached paper would as a practical matter eliminate St. Helens as a bag producer because almost 90% of St. Helens' bag paper was unbleached (CX 168A [XIII, 4049]).

Economic common-sense and the history and purpose of the amended § 7 require the projection of the results of a merger over a significant span of future time if there is to be a conclusion that the results "may be substantially to lessen competition, or to tend to create a monopoly" (see Sen. Rep. No. 1775, 81st Cong., 2nd Sess., p. 6 (1950); *American Crystal Sugar*, *supra*, 259 F. 2d at 527; *Proctor & Gamble Co.*, Dkt. 6001, 3 CCH Trade Reg. Rep. ¶ 15,245 (FTC 1961); *cf. International Shoe Co. v. FTC*, 280 U. S. 291), and on the market defined by the Court of Appeals such projection cannot support the result.

*General Motors* and *American Crystal Sugar*, *supra*, point out (353 U. S. at 593; 259 F. 2d at 527), the relevant market must be defined before consideration can properly be given to the question whether an acquisition has the proscribed effect in *that* market.

The Ninth Circuit found, on the basis of unsatisfactory fragments of evidence, that Crown had 50.53% of the market and, after its errors were pointed out by petition for rehearing, defended its affirmance by stating that it would not be material if Crown's share were only 35% (A-79). What if, after a fair trial, it turned out to be far less than that, and St. Helens' share of the market turned out to be only a fraction of that found by the Court?

The Hearing Examiner's impression of the relative importance of Crown and St. Helens was derived from (i) testimony concerning the Commission's purported market survey, (ii) Commission's Exhibit 62 which purported to reflect the results of the survey, (iii) the 338 pages of Commission's Exhibit 176 which purported to restate the results of the survey, and (iv) the entire testimony of the Commission's only expert witness which was based solely upon the survey.

The Commission originally offered in evidence what it claimed was a statistical summary of this secret survey.*

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* Section 6 of the Federal Trade Commission Act, under whose purported authority the survey was conducted, does not, in the first place, authorize such *ex parte* surveys in adjudicative proceedings, without participation by the respondent or supervision by the Hearing Examiner. Contrast the procedure followed in the present case with the complete access to survey data gathered by the Department of Justice in *United States* v. *National Homes Corp.*, 5 CCH Trade Reg. Rep. ¶70,095 (N.D. Ind. 1961).

The Hearing Examiner refused even to consider receipt of the survey report into evidence because of the secrecy of the survey questionnaires which it purported to summarize (R. 785-87). On appeal by Commission counsel, the Commission relaxed but did not remove its secrecy restrictions and then directed the Hearing Examiner to admit the survey report into evidence regardless of any bias, incompetence or dishonesty in the survey or in the survey report which might be disclosed when the underlying documents were no longer completely secret (R. 47-48; see R. 134-35). This outrageous decision of the Commission had the result of so permeating the record with distortion and falsehood that a fair trial became impossible. Natural sequels were the denial to Crown of the right of cross examination because of the secrecy restrictions; the Hearing Examiner's refusal to strike the evidence when its palpable dishonesty could no longer be disputed; the Commission's refusal to strike the evidence which had so colored the whole proceeding; and finally, the insistence of the Commission that the survey evidence be printed for the Ninth Circuit.

Crown is now told that these errors were all harmless because the Commission says it did not rely upon the survey to arrive at its decision.* The history of the proceeding raises very serious doubt on this disclaimer. The

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* Characterizing the Commission's disclaimer of reliance, however, the Ninth Circuit could offer only the cautious statement that,

> "Notwithstanding the Commission itself had required the Examiner to admit this exhibit, the Commission in its final opinion appears to have had doubts as to its propriety or its value, and, while declining to strike the exhibit from the record, nevertheless stated: [quoting the disclaimer, from R. 620] . . ." (A-65)

untruths in the survey evidence were emphasized and re-emphasized before the Hearing Examiner. Commission counsel represented to the Commission that it should rely on the survey because it was "probably the most useful and reliable that will ever be submitted to the Commission" (R. 5445). The Commission's expert witness, *upon whom no one denies reliance*, based his 95 pages of expert testimony solely on the survey report (R. 5162-5244).

The Commission's initial order directing that the Hearing Examiner receive the survey report in evidence irrespective of what might be disclosed when the underlying data, or portions of it, were no longer kept secret from Crown—not only usurped the Hearing Examiner's authority to rule upon offers of proof,* but led inevitably to a succession of increasingly grievous rulings.

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* Section 7(b) of the Administrative Procedure Act provides in relevant part:

> "Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to . . . (3) rule upon offers of proof and receive relevant evidence. . . ." (5 U.S.C. § 1006(b).)

The qualification relating to the "published rules of the Agency" is inapposite here. See *Attorney General's Manual on the Administrative Procedure Act* (1947), page 75, and the Commission's Rules of Practice, § 3.15(c) (19 C.F.R. § 3.15(c)), now § 4.13(c), 26 F.R. 6018.

Section 7(b) prevents the Commission from instructing a Hearing Examiner how to rule on an offer of evidence. As stated in the *Attorney General's Manual, supra* at page 74:

> ". . . not only are the enumerated powers thus given to hearing officers by section 7(b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the statutory language, 'shall have authority', but from the general statutory purpose of enhancing the status and role of hearing officers."

The Hearing Examiner ruled that the Longview sales analysis, a working paper used in the survey, could be kept secret from Crown; this secrecy has led the Ninth Circuit into substantial error as to Longview's sales (see page 41, *supra*). The defects in the survey were partially concealed by the Commission's order that the contents of the survey questionnaires be excluded from the record, so that the extent of its errors and the true nature of the survey itself could not be disclosed (see Finding 87, R. 585).

Moreover, Crown was refused the right to question witnesses concerning the accuracy of their answers to the survey questionnaires (*e.g.*, R. 1442, 1458-59, 2237-38) or to use their answers to impeach hostile testimony given on the witness stand (R. 1442, 2880). Compare, *FTC* v. *Carter Products Inc.*, 346 U. S. 327, *vacating per curiam and remanding*, 201 F. 2d 446 (9th Cir. 1953).

Despite the secrecy Crown was able to demonstrate beyond dispute:

1. Deliberately to exaggerate the importance of St. Helens and Crown and to minimize the sales of their competitors, the survey was designed to cover all customers of St. Helens, most of the customers of Crown and only a few customers of other mills (R. 91-92).

2. Many of the questionnaires were filled out by the Commission itself rather than by the purportedly reporting companies (R. 62, 84, 109, 118, 126). The Commission, misinterpreting its own questions, advised some of St. Helens' customers to *misreport* their paper purchases (R. 62, 84). In 180 instances the Commission did not tabulate the information reported by the companies sur-

veyed but arbitrarily altered the figures without authority or discussion with the reporting companies (R. 57, 62-64, 66-67, 72-73, 84, 108-09, 126, 586).

3. Although the extent of imports from other areas of the country was crucial not only to the question of market shares but the question whether the west is a "separate" section of the country, large reported purchases from eastern mills were not tabulated by the Commission (R. 124, 126). One return not tabulated reported purchases of over $10 million dollars from many different suppliers (R. 103, 1086-89). Although St. Helens and Hudson (an eastern supplier) are known to have had approximately equal sales of bags in the Pacific Coast states, the survey attributed almost 19 times the sales to St. Helens that it did to Hudson (see p. 20n., *supra*).*

After all of the foregoing and many other defects were disclosed during the course of the hearing, Commission counsel offered in evidence an amended survey report (CX 176), which purported to correct only a few of its deficiencies. At this time, although it was no longer disputed that the survey was badly biased and the survey report itself was untruthful and inaccurately reflected the information furnished to the Commission (R. 4925-40), the amended report was nevertheless received in evidence.

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* Asked why he removed from the survey report $2,000,000 of sales of carbonizing tissue by eastern mills to western customers, the Commission's economist testified:

> "Well, I am not sure that I can answer that to my own satisfaction. I doubt if I can answer it to yours." (R. 5044)

The effect, of course, was to minimize shipments from the east and increase the market shares attributed to Crown and St. Helens.

and the Commission's expert economist was permitted to give his opinion evidence solely on the basis of this survey report.*

At the conclusion of the hearing, the Hearing Examiner found that the survey exhibits were so distorted and unreliable and the circumstances surrounding them so abhorrent to due process that they could not be relied upon (Findings 83-91; R. 583-86). Yet, he refused to strike the survey evidence because of the Commission's prior order, and it became part of the context of the Commission's affirmance (R. 134-35).

The Commission stated that it did not rely on the survey exhibits, but again refused to strike the evidence and not only transmitted it to the Ninth Circuit but insisted that it be printed in that Court. The Ninth Circuit, as reference by it indicates (A-41n.), carefully read the survey evidence, but it too disclaimed reliance upon it; yet, fundamentally, the Court was accepting and adopting a decision of the Commission, which decision was itself tainted by the survey evidence. The Ninth Circuit does not claim, nor indeed would *Chenery* permit it, to have completely disregarded the decision of the Commission and to have based its affirmance solely upon an original investigation of the written record without regard to Commission action.

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* Crown made four objections to the survey evidence, beginning at R. 774, 813, 929 and 5077, respectively, in addition to presenting a brief in support of its motion to strike that evidence after the close of the proceedings (reprinted at R. 54-132). Based on those objections and the inadequate response to them, the receipt of this evidence was completely inconsistent with statutory and constitutional standards of due process.

Crown in fact demonstrated in detail in the Court of Appeals that one of the essential findings of the Commission must have been based upon survey evidence because there was no other evidence in the record to support it. This was Finding 76, and particularly the portion of that Finding that "Western supplies of coarse paper and coarse paper products have come principally from Western mills" (R. 581). Crown pointed out that, for eight of the eleven states covered by that Finding, there was literally no evidence as to where any purchaser bought his paper, other than the survey evidence. Crown pointed out that this sentence was taken verbatim from Proposed Finding 267 of Commission counsel (R. 222); no record reference had been offered by Commission counsel for this statement, but instead they referenced to other proposed findings. Crown analyzed every record reference supporting the cross-referenced proposed findings and demonstrated that not a single one of them could support the finding questioned. In its answering brief, the Commission was unable to cite a single fact in the record to support this finding, other than the survey.

The Ninth Circuit did not discuss this demonstration that the Commission had in fact relied on the survey; instead it excluded these eight states from the market and therefore did not concern itself with the question whether there was any evidence to support the finding. But this ignored the crucial issue: had the Hearing Examiner and the Commission, consciously or unconsciously, relied upon the survey in deciding the case?*

* Because of the central role played by the survey evidence in the proceedings before the Commission, many of the findings and conclusions essential to the result there reached (*e.g.*, Finding

The foregoing criticisms of the trial, harsh though they are, are not disputed, and the vice of such a trial has borne the intended fruits. Using every conceivable method of distortion, the survey was unable to exaggerate Crown's market share beyond 31.4%, nor could it minimize Longview's share below 28.2%. Yet, because of the sorry state of the record—resulting largely from the fact that counsel supporting the complaint was at every step encouraged by the Commission and permitted by the Hearing Examiner to build a record which would stand or fall upon the survey evidence—the Ninth Circuit found, on the basis of the admittedly unsatisfactory fragments of evidence left when the survey is put aside, that Crown had 50.53% of the market and Longview only 17.17%. Crown is thus left with the choice of being judged on the basis of the secret and outrageously distorted survey evidence (which, even considered as the Court of Appeals suggested (A-41n.) as an "admission" by the Commission, would indicate something radically wrong with the Court's findings), or must suffer from the even harsher guesses made by the Ninth Circuit in the absence of evidence. To deprive Crown of property

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.79; Conclusions 5, 9) were not supported by substantial, reliable and probative evidence on the record as a whole, as required by § 11 of the Clayton Act and §§ 7(c) and 10(e) of the Administrative Procedure Act.

When the serious procedural irregularities below were pointed out to the Ninth Circuit it compounded the Commission's errors; its new and pervasive statistical estimates were clearly the fruit of its two logically related errors in (1) ignoring Crown's specific objections to Commission action and thus its own duties as a reviewing Court under § 11 of the Clayton Act and § 10(e) of the Administrative Procedure Act, and then (2) making its own estimates on the basis of the same wholly inadequate record and coming into conflict (*Chenery* aside) with *Universal Camera Corp.* v. *NLRB* and *FTC* v. *Standard Oil, supra.*

on the basis of this record would be to render judgment without affording Crown the due process of law which the Constitution guarantees.

## POINT IV.

### a. The Ninth Circuit erred in affirming without passing upon petitioner's contention that the divestiture order should not include the former St. Helens timberlands.

St. Helens operated a paper mill and, as completely separable property, it owned 117,000 acres of timberland. The opinion of the Ninth Circuit is addressed exclusively to the paper mill, without any discussion of the question whether the acquisition of the timberland may substantially lessen competition in any line of commerce.

The Commission made no findings which would support the inclusion of the timberlands in its order of divestiture. Moreover, it affirmed a finding of the Hearing Examiner that "timber does not come within the line of commerce involved in this proceeding" (R. 593). However, it adopted without comment the Hearing Examiner's conclusion that the acquisition of the St. Helens' timberland "served to enhance the dominant position held by the respondent." (R. 593) This conclusion is completely unsupported and unsupportable.

Prior to the acquisition, Crown owned 4/10ths of 1% of the commercial forest land in the west and St. Helens owned 1/10th of 1% (RX 92A, pp. 271, 450). One of Crown's major competitors, Weyerhaeuser, alone owned

almost four times as much as Crown and St. Helens combined (RX 92A, p. 450). Crown had no "dominant position" and there could be scant "enhancement" by the acquisition.

Timber holdings are unnecessary to support the St. Helens paper mill. Wood chips and other waste wood materials are now the major source of wood for making pulp for the manufacturer of paper in the west. Wood chips are a relatively inexpensive by-product of lumber and plywood mill operations and represent all or almost all of the wood used by trade course paper mills such as Weyerhaeuser (R. 3957), Potlatch (R. 2913) and Longview (R. 1747-48). The study made by Stanford Research Institute indicates that the ownership of timberlands increases substantially the investment in a paper company without a commensurate return in operating income (RX 92A, pp. 407-416, 439).

Accordingly, St. Helens has a blower conveyor by which it receives wood chips directly from the adjacent sawmill of Pope and Talbott (R. 1835).

There is no finding that this timberland is necessary or even desirable for the operation of the St. Helens mill. In fact, 44,000 acres could not be used for St. Helens under any circumstances because they are located too far from the mill (R. 1875-76; CX 4 [I, 1755]).

On the record and on the findings, the order requiring divestiture of St. Helens' timberlands cannot be supported.

**b. The Ninth Circuit erred in affirming without passing upon petitioner's contention that the order entered by the Commission exceeded its statutory authority.**

The Commission's order would require Crown "to restore St. Helens . . . as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition." (R. 604)

Section 11 of the Clayton Act provides that, upon finding that § 7 has been violated, the Commission "shall issue . . . an order requiring such person to . . . divest itself of the stock, or other share capital, or assets, held . . . contrary to the provisions of" § 7.

As this Court said in *FTC* v. *National Lead Co.*, 352 U. S. 419, 428:

> "As the Court has said many times before, 'the Commission may exercise only the powers [in framing orders] granted it by the Act."

The limits of the Commission's powers under § 11 have been carefully circumscribed; its powers to order divestiture of shares or assets include no general equity power:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. . . . It has not been delegated the authority of a court of equity." (*FTC* v. *Eastman Kodak Co.*, 274 U. S. 619, 623)*

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* The Ninth Circuit itself stated in *Western Meat Co.* v. *FTC*, 23 F. 2d 824, 827 (9th Cir. 1929), *cert. granted*, 280 U. S. 545, *cert. dismissed*, 281 U. S. 771:

> "A decree ordering that a divestment of stock unlawfully acquired be made in such a way as to restore competition

The Commission has sought repeatedly, but unsuccessfully, to have the Congress amend § 11 so as to give it the power to frame an order which would require the acquiring company to recreate an "entity". The Commission has argued to the Congress:

> "The Commission believes that section 11 of the Clayton Act should be amended in a manner that would permit the Commission to adopt an appropriate remedy fitting the facts in each case. An order of divestiture alone may not be sufficient. *The Commission should have the means to provide for divestiture in a manner which promises to recreate an effective competitive entity.* The draft submitted herewith incorporates . . . language which is believed to be preferable. . . . This provision would authorize the Commission to order divestiture 'in such manner and under such conditions as will effectuate the purposes of section 7 of this act.'" (Italics added.)*

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would be incapable of enforcement. The most that could be done was that which was done here, to require the divestment of the stock and the property and to deny the offender the right to obtain or keep any advantage which might be the result, directly or indirectly, of its unlawful act."

* Hearing before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary pursuant to S. Res. 170 (84th Cong., 2d Sess., May and June 1956), p. 466. See also Hearings before the Antitrust Subcommittee (No. 5) of the House Committee on the Judiciary (84th Cong., 2d Sess., January 1956), pp. 30-31; Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary pursuant to S. Res. 61 (84th Cong., 1st Sess., May and June 1955), p. 114.

The Congress, however, has not granted to the Commission the equity powers which it has sought, and the Commission cannot arrogate to itself powers which the Congress has deliberately withheld.

The order "to restore St. Helens . . . as a competitive entity . . . as organized and in substantially the basic operating form it existed at or around the time of the acquisition", is ambiguous. The Commission has never made a forthright statement of its interpretation of the order and the Court of Appeals has not, as required by § 10(e) of the Administrative Procedure Act,* determined the meaning or applicability of this language.

Whatever meaning the Commission ultimately intends to ascribe to its language, the order exceeds the Commission's authority if it is intended to depart from the language of § 11 of the Clayton Act.

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* Section 10(e) provides that:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. . . ." (5 U.S.C. § 1009(e))

Agency action must be set aside, *inter alia*, when "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." (*Ibid.*)

## CONCLUSION

It is therefore respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted.

ARTHUR H. DEAN
HOWARD T. MILMAN
ROY L. PROSTERMAN
48 Wall Street
New York 5, N. Y.

PHILIP S. EHRLICH
2002 Russ Building
San Francisco 4, California.
*Attorneys for Petitioner*

SULLIVAN & CROMWELL
*Of Counsel*

March 16, 1962

# APPENDIX

## I. Statutes Involved

*Clayton Act § 7, 64 Stat. 1125 (1950); 15 U.S.C. § 18:*

**§ 18. Acquisition by one corporation of stock of another.**

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

*Clayton Act § 11, 64 Stat. 1126 (1950), as amended, 73 Stat. 243 (1959), 28 U.S.C. § 21:**

**§ 21. Enforcement provisions; procedure.**

**(a) Commissions and Boards authorized to enforce compliance.**

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio

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* The text set forth is as amended in 1959, 73 Stat. 243; the earlier version of this section set forth in 64 Stat. 1125 (1950) is that applicable to the present case, but does not differ from the amended section in any respect material to this petition.

transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

**(b) Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders.**

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18 and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hear-

ing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in

the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

**(c) Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modification of findings; finality of judgment and decree.**

Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order

of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

**(d) Exclusive jurisdiction of Court of Appeals.**

Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

* * * * *

*Federal Trade Commission Act §§ 6 (b), (f), 38 Stat. 721 (1914), 15 U.S.C. §§ 46 (b), (f).*

**§ 46. Additional powers of commission.**

The commission shall also have power—

* * * * *

**(b) Reports by corporations.**

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

* * * * *

**(f) Publication of information; reports.**

To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; . . .

* * * * *

*Administrative Procedure Act, §§ 7 (b), (c), 60 Stat. 241 (1946), 5 U.S.C. §§ 1006 (b), (c):*

**§. 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.**

* * * * *

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas [sic] authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

"(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . .

* * * * *

*Administrative Procedure Act § 10(e), 60 Stat. 243 (1946), 5 U.S.C. § 1009(e):*

**§ 1009. Judicial review of agency action.**

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * *

**(e) Scope of review.**

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

## II. Opinions of the Ninth Circuit

# UNITED STATES COURT OF APPEALS
For the Ninth Circuit

| | |
|---|---|
| Crown Zellerbach Corporation, *Petitioner*, vs. Federal Trade Commission, *Respondent*. | No. 15,904 June 5, 1961 |

On Petition to Review an Order of the Federal Trade Commission

Before Pope, Magruder and Merrill, Circuit Judges.

Pope, Circuit Judge.

In June, 1953, the petitioner Crown Zellerbach Corporation acquired the stock and assets of St. Helens Pulp and Paper Company. On February 15, 1954, the Federal Trade Commission filed a complaint against the petitioner charging that such acquisition of St. Helens by Crown Zellerbach was a violation of §7 of the Clayton Act, (15 U.S.C. §18) as amended and approved December 29, 1950,[1] in that "the effect of the aforesaid acquisition by

[1] § 18. . . . No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

respondent [Crown Zellerbach] of control of St. Helens may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce, as 'commerce' is defined in the Clayton Act, in which respondent and St. Helens were engaged in the Western States and more particularly in the Pacific Coast States of the United States, and in each of them."

After answer was filed admitting the acquisition but denying that such acquisition violated §7 of the Act, hearings were held before an Examiner from January 10, 1955 to November 20, 1956. The Examiner found that the allegations of the complaint had been sustained. Upon appeal the Commission made findings of its own modifying certain of the findings of the Examiner, but adopting the Examiner's conclusions that the acquisition "had the effect of substantially lessening competition and tending to create a monopoly in the relevant line of commerce in violation of Section 7 of the Clayton Act, as amended." A final order of divestment was issued December 26, 1957, and this petition for review followed.

Both Crown Zellerbach Corporation, here called Crown, and St. Helens Pulp and Paper Company, here called St. Helens, were corporations engaged in the manufacture of pulp and paper and the sale of paper and paper products through much of the West.[2] At the time of the acquisition

[2] By the "West" unless otherwise qualified, we refer to the Bureau of the Census definition of that region which includes the Pacific Coast states (Washington, Oregon, California), and the Mountain states (Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada).

of St. Helens, Crown was the largest pulp and paper company in that area and one of the largest in the nation. It carried on a fully integrated operation from timber lands and logging operations through the production and distribution of paper and paper products. It had timber holdings consisting of approximately 500,000 acres owned in fee in Washington and Oregon and cutting rights on approximately 20,000 acres, managing its timber lands on a sustained yield basis. Zellerbach Paper Company, a wholly owned subsidiary, was a large seller of paper products, the larger portion of which were bought from Crown.[3]

In 1953 Crown produced pulp and paper at its mills in Oregon and Washington. These were located at Camas, Washington; West Lynn, Oregon; Port Angeles, Washington; Lebanon, Oregon; and Port Townsend, Washington. During the time this case was under consideration before the Commission, it was preparing for production at another mill at Antioch, California. It owned 99 percent of Crown Zellerbach Canada, Limited, a fully integrated pulp and paper mill in Canada, and also had large timber holdings in Canada. It had facilities for converting portions of its paper production into paper products at some of the mills above listed, and also at Harlingen, Texas; North Portland, Oregon; and San Leandro and Los Angeles, California. While the case was pending before the Commission it acquired through another merger mills

[3] Crown owned a substantial interest, nearly 50 percent, in Fibreboard Products, Inc., a paper and paperboard producer, which it sold in 1956.

at Bogalusa, Louisiana; Baltimore, Ohio, and Dresden, Ohio.

St. Helens was also a fully integrated pulp and paper mill having a capacity of 180 tons of paper a day. It had 117,000 acres of high quality timber land and important cutting rights. Its mill was located at St. Helens, Oregon.

In making its inquiry as to whether the merger here accomplished fell within the prohibition of §7, the Commission was confronted initially with the task of determining what was the relevant market, both as respects products and as concerns geographical area. This was a necessary step precedent to determining whether within that market there was a probability that the effect of the acquisition of St. Helens by Crown would be substantially to lessen competition or to tend to create a monopoly. The Commission held that "the coarse paper line relating generally to coarse wrapping papers, bag and sack papers and convertible papers is a sufficiently distinct product line to be a 'line of commerce' within the meaning of Section 7." With respect to geographical market, it held that "the Eleven Western States,[4] as found by the hearing examiner, is an appropriate section."

In order to review those determinations we must first inquire, after an examination of the record, as to the products with respect to which Crown and St. Helens competed, and the location and area of that competition. The question is just where these parties met in the paper and paper product market.

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[4] Composing the "West" as previously defined.

*Appendix*

In general, grades of paper fall within three separate categories: namely, coarse, fine and newsprint. St. Helens was a coarse paper producer. Crown produced and sold a very complete line of paper and paper products, many of which were not produced or sold by St. Helens. Included in this line were newsprint, groundwood paper, machine-coated printing and converting paper, and fine paper. On the other hand, both Crown and St. Helens produced and sold, in competition with each other certain varieties of coarse papers including wrapping paper, shipping sack paper, bag paper, envelope paper, gumming paper, waxing paper, and other converting paper.

Generally speaking, in the trade and in the classifications of paper listed by the Bureau of Census, all coarse papers known to the trade are listed in various groups. What these are are disclosed in the petitioner's brief under Table VI which shows the production in the United States in the year 1953 of all trade coarse paper. That table is as follows:

*Appendix*

## TABLE VI

### 1953 Trade Coarse Paper Production in the United States by Census Classifications and Principal Grades Thereof

| (Tons of 2,000 Pounds) | United States |
|---|---|
| Total Trade Coarse Paper | 17,749,333 |
| Census coarse paper | 3,392,000 |
| Wrapping paper | 634,409 |
| Shipping sack paper | 749,443 |
| Bag paper | 895,949 |
| Envelope paper | 119,746 |
| Gumming paper | 94,541 |
| Waxing paper | 223,177 |
| Other converting paper | 516,413 |
| Other | 158,322 |
| Census special industrial paper | 554,396 |
| Tabulating card stock | 118,653 |
| File folder stock | 25,718 |
| Tag stock | 104,507 |
| Vulcanizing fibre stock | 28,668 |
| Resin impregnated stock | 38,862 |
| Other | 237,988 |
| Census sanitary tissue stock | 1,277,694 |
| Toweling stock | 296,952 |
| Toilet tissue stock (regular and facial tissue types) | 607,114 |
| Napkin stock (regular and facial tissue types) | 149,283 |
| Facial tissue stock (other than napkin and toilet stock *e.g.* handkerchiefs) | 180,284 |
| Other | 44,061 |
| Census tissue paper, except sanitary and thin | 230,959 |
| Wrapping tissue | 51,877 |
| Waxing tissue stock | 103,647 |
| Fruit and vegetable wraps | 22,282 |
| Other | 53,153 |
| Census container board | 6,616,889 |
| Liners | 4,412,745 |
| Corrugating material | 1,906,116 |
| Other | 298,028 |
| Census bending board | 3,566,683 |
| Folding boxboard stock | 2,429,143 |
| Special food board | 967,899 |
| Other | 169,641 |
| Census nonbending board | 950,293 |
| Setup boxboard, unpasted | 763,341 |
| Other | 186,952 |
| Census special paperboard stock | 1,085,204 |
| Tube stock | 229,260 |
| Liner for gypsum and plaster board | 459,572 |
| Other | 396,372 |

It will be noted that the first listed categories of coarse paper are grouped under the heading "Census coarse paper", which includes the papers sold by St. Helens. Although the other groups listed, such as "special industrial paper" are also coarse papers, yet for classification in the Census statistics only the categories just named are called Census coarse paper.

The Examiner found that in the year 1953, the year of the acquisition of St Helens, about 84 percent, or 48,155 tons of St. Helens' total production was made up of various of these listed grades of paper which the Census chose to designate as Census coarse paper.

Finding that Crown produced 51.5 percent of the total of these so-called Census coarse papers produced in the West, the Examiner concluded that "the line of commerce involved in this proceeding is the various papers falling within the Census category of coarse papers." The Commission agreed.[5]

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[5] "In this connection, a question for determination is whether or not the coarse paper line, including wrapping, bag and sack papers and converting papers, which the hearing examiner refers to as Census coarse papers, is a 'line of commerce' within the meaning of the Clayton Act.

All such papers are in a relatively allied line, particularly in respect to markets and end uses. They generally relate to the packaging and wrapping field where a flexible type packaging material is appropriate or desirable. Wrapping papers, as the name implies, are made and used primarily for wrapping; they are produced in many sizes, colors, finishes, weights and other specifications appropriate for this field. Similar considerations apply as to bag and sack papers and other converting papers. Such factors as physical characteristics, markets, prices, and uses, all or in part tend to distinguish these papers from other papers and paperboard.

The petitioner attacks this determination of these papers as constituting the relevant line of commerce, product-wise, and asserts that all trade coarse papers as listed in the table, supra, constitute the product dimension of the relevant market. Petitioner says that the papers designated as

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Distinctions among individual types of paper or paperboard are readily apparent. As an example, one of the papers which respondent would include with the relevant product is container board, a separate category in the broad line of trade coarse papers. Container board is used in the manufacture of boxes, particularly the corrugated paper box. This is ordinarily a heavier paper than the usual run of wrapping and bag papers. Container board also utilizes a high proportion of waste paper as compared with the coarse wrapping and bag papers, resulting generally in a lower quality paper. In addition, these particular papers involve different markets. Container board is made into boxes and sold to manufacturers of products requiring strong, lightweight shipping containers. Wrapping papers and bags (the converted product) are generally sold in markets which include paper jobbers, wholesalers, such as grocery wholesalers, and large consumers; such as chain grocers, ultimately to be used in large part by retailers for packaging or wrapping at the point of sale to the consumer. Moreover, there is evidence of price variations as between such categories of paper or paperboard. These and other differentiating factors illustrate the distinctiveness of the competitive fields involved in the broad trade coarse paper line.

It is argued by the respondent that some of the papers in the coarse wrapping, bag, sack, and converting paper field are substantially similar to some of the papers in other fields and that since they may be used interchangeably, the product line of commerce should not be so narrowly defined. The nature of many papers indicates that they are unsuitable generally for any purpose other than that for which they are made, such as toilet tissue. On the other hand, some papers such as certain container boards and certain wrapping papers might replace each other in use, but the evidence indicates that there is little such substitution in actual practice.

It is our opinion, in view of the foregoing consideration, that the coarse paper line relating generally to coarse wrapping papers, bag and sack papers and convertible papers is a sufficiently distinct product line to be a 'line of commerce' within the meaning of Section 7."

constituting a relevant market by the Commission, although they are listed under a single heading as "Census coarse paper" are not thereby proven to measure the product dimension of the relevant market in that they are grouped together by the Census merely for statistical reasons and that the Census grouping means nothing; that the grades selected by the Commission have little relation to each other and serve many diverse uses, while on the other hand, there is a greater degree of substitutability between the so-called Census coarse papers and other trade coarse papers than among ordinary Census coarse papers themselves; that all trade coarse papers are made from the same raw materials in the same mills on the same machines and this production flexibility requires that all trade coarse papers should be included in the relevant market.

As for the argument that the Census classification does not settle what constitutes a relevant market, we agree. At the same time we must recognize that it is possible that this grouping has behind it some facts or circumstances relating to the paper industry which may have led to the grouping originally although it is not specifically named or designated in the Census report. Such circumstances may or may not have some bearing upon the question of what may be the relevant market here. Hereafter we shall have occasion to discuss specifically the other reasons given by petitioner for making all trade coarse papers as listed in the table above a part of the relevant market, such as the flexibility in production, the substitutability of use, etc. But at this point we think it plain that what is important, as an aid to the determination of what is the relevant mar-

ket is a consideration of what are the facts concerning competition in the market place. To that we address our attention.

We begin with what the record shows as to how St. Helens operated; what products it sold; where it sold those products; to what extent this constituted competition with the petitioner and others; what other producers were selling the same products in the same market; and, relative to all other suppliers of these products in the same area, how much of a competitive factor St. Helens was. Of course the patterns of trade carried on by St. Helens alone do not furnish the entire answer in our effort to discover the patterns of trade in the paper industry which were followed in practice, from which the Board must determine the relevant market; but what St. Helens produced and sold in competition with other paper manufacturers, and particularly in competition with the petitioner, furnishes the best place to begin; and it is manifest that generally speaking we must find the relevant market product-wise in those products in which St. Helens was a significant factor before the merger. Thus St. Helens produced no newsprint nor fine paper, and plainly enough, those types and grades do not figure here.

We turn now to the statistics shown in the record for the answers to these questions. Initially we inquire about volume of production of the paper categories mentioned, namely, those grouped under the heading Census coarse paper in table VI above. In the West, in the year 1953, the total production of these papers, that is to say, wrapping paper, shipping sack paper, etc., was 437,384 tons.

Of this quantity Crown produced 225,270 tons, or 51.5 percent of the total, and St. Helens produced 48,155 tons, or 11 percent of the total. The combined total of these two producers was thus 62.5 percent of the whole. It is conceded that the production of these papers by these concerns was substantially the same in the preceding year, 1952. During the year 1953, St. Helens also produced papers within the other categories listed on table VI, i.e., special industrial paper, sanitary tissue, tissue paper except sanitary, thin container board, bending board and special paper board. These papers were produced by St. Helens in comparatively small amounts. The production figures show that in 1953, the 48,155 tons of the so-called Census coarse papers constituted approximately 84 percent of St. Helens' production.

Petitioner criticises the use of these figures by the Examiner and the Commission to demonstrate that St. Helens' paper production fell predominantly and most significantly within the so-called coarse paper category, contending that production is not necessarily significant with respect to the amount or area of competition. It argues that the Commission's findings based upon production statistics are misleading because what is meaningful in ascertaining the extent and amount of competition which would be affected by the merger would be the sales statistics. It notes that much of the production of both companies was sold outside of the West and beyond the area of the country which the Commission treated as relevant to its decision in this case. We think it is correct to say that the sales statistics rather than production figures are generally speaking more

significant in arriving at the relevant market both as respects product and geographical area. However, as hereafter noted; the problem as to the meaningful competition prior to the merger is not so simple as to be resolved solely by reference to sales.

While neither party here has compiled for us charts or tables showing their sales in the various geographical areas considered by the Commission, the information is nevertheless available in the record. These are shown for the year 1952 in tons and by states on the charts which we here attach. The charts include manufactured bags besides the listed papers shown under the heading of Census coarse paper in Table VI. The reason for the inclusion of bags we explain shortly. The first chart, Chart A, relates to Crown. The second chart, Chart B, relates to St. Helens. (Since these charts have been compiled by us from the record, an explanation of their sources is given in Appendices A and B.)

## CHART A.

CROWN-ZELLERBACH'S 1952 SALES IN TONS BY STATES, OF 7 "CENSUS COARSE PAPERS", PLUS BAGS

| (Chart A) | Calif. | Ore. | Wash. | Idaho | Nev. | Mont. | Wyo. | Colo. | Utah | Ariz. | N. Mex. | Total sales, by item from statistics on this chart | Sales, 11 West. states, as shown on chart, gov't brief face page 145 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Wrapping paper | 20,920.9 tons | 3,234.4 tons | 4,022.3 tons | 443.2 tons | 238.5 tons | 583.1 tons | 131.7 tons | 2,160.4 tons | 1,858.5 tons | 445.1 tons | 372.7 tons | 34,410.8 tons | 34,417 |
| Shipping—Sack paper | [Crown converted most such paper into sacks. No area breakdown of sales is given, but the table on p. 33 of Crown's opening brief indicates its total sales of this grade, exclusive of sales to Zellerbach, in the eleven western states were 6,264 tons.] | | | | | | | | | | | 6,264 tons | —0— |
| Bag paper | 19,568.9 tons | 221.1 tons | 2,627.0 | —0— | —0— | —0— | —0— | —0— | —0— | —0— | —0— | 22,417.0 tons | 22,417 |
| Envelope paper | 3,554.4 tons | 278.0 tons | 19.2 tons | —0— | —0— | —0— | —0— | 201.6 tons | 0 | 28.8 tons | —0— | 4,082.0 tons | 4,082 |
| Gumming papers | 2,072.6 tons | 3,597.9 tons | 3.9 tons | —0— | —0— | —0— | —0— | —0— | —0— | —0— | —0— | 5,674.4 tons | 5,674 |
| Waxing papers | 18,279.7 tons | 8,199.5 tons | 1,642.6 tons | —0— | —0— | —0— | —0— | —0— | —0— | —0— | —0— | 28,121.8 tons | 28,122 |
| "Other converting" papers | 7,859.8 tons | 1,323.9 tons | 2,010.2 tons | 55.5 tons | —0— | 160.8 tons | —0 | 549.8 tons | 7.8 tons | 421.4 tons | 48.7 tons | 12,437.9 tons | ? |
| Total sales, by State, of Census papers on this chart | 72,255.8 tons | 16,854.8 tons | 10,325.2 tons | 498.7 tons | 238.5 tons | 743.9 tons | 131.7 tons | 2,911.8 tons | 1,866.3 tons | 895.3 tons | 421.4 tons | inapplicable | inapplicable |
| "Comparable" totals from Crown opening brief pp. 213-214 (excluding "other converting") | 37,408 | 2,905 | 7,046 | 227 | 27 | 568 | 113 | 2,362 | 1,578 | 317 | 380 | inapplicable | inapplicable |
| Manufactured bags (excluding lunch, garbage, & sandwich bags.) [In tons & bales] | 35,499.09 tons | 4,035.38 tons | 6,538.71 tons | 786.40 tons | 335.48 tons | 1,111.12 tons | 197.54 tons | 2,874.73 tons | 2,630.54 tons | 1,203.89 tons | 742.30 tons | 55,955.18 tons | inapplicable |
| | 1,154,442 bales | 131,232 bales | 212,641 bales | 25,574 bales | 10,910 bales | 36,134 bales | 6,424 bales | 93,487 bales | 85,546 bales | 39,151 bales | 24,140 bales | 1,819,681 bales | |
| Impregnated bags (lunch, garbage, etc.) | 150,897 cases | 11,317 cases | 26,043 cases | 677 cases | 340 cases | 1,087 cases | 176 cases | 7,669 cases | 2,953 cases | 5,870 cases | 406 cases | 207,465 cases | inapplicable |

## CHART B

ST. HELENS' 1952 SALES IN TONS, BY STYLE OF 7 CENSUS COARSE PAPERS PLUS MFGD BAGS

| (Chart B) | Calif | Ore | Wash | Idaho | Nev | Mont | Wyo | Colo | Utah | Ariz | N Mex | Total sales by item, from statistics on this chart | Sales, 11 Western states (for comparison), from chart on page 145 (a) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Wrapping paper | 8,004.87 tons | 1,916.07 tons | 1,772.03 tons | 78.08 tons | -0- | 190.91 tons | 7.00 tons | 216.28 tons | 264.19 tons | 529.03 tons | 45.00 tons | 13,018.72 | 13,375 |
| Shipping—Sack paper | 2,807.95 tons | -0- tons | 2,823.58 tons | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | 5,721.53 | 5,722 |
| Bag paper | 570.19 tons | 21.48 tons | 117.94 tons | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | 709.61 | 775 |
| Envelope paper | 2,316.11 tons | 309.69 tons | 249.42 tons | -0- | -0- | -0- | -0- | 445.34 tons | 1.23 tons | -0- | -0- | 3,321.79 | 3,322 |
| Gumming paper | 695.01 tons | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | 695.01 | 695 |
| Waxing paper | 1,284.94 tons | -0- | 281.81 tons | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | 1,566.75 | 1,807 |
| "Other converting" papers | 895.48 tons | 260.14 | 215.39 tons | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | 1,371.01 | 3,511 |
| Total sales, by state, of Census coarse papers | 17,204.55 tons | 2,507.38 tons | 5,460.17 tons | 78.08 tons | -0- | 190.91 tons | 7.00 tons | 655.62 tons | 265.42 tons | 529.03 tons | 45.00 tons | inapplicable | inapplicable |
| Comparable totals from Crown opening brief page 211 (state sales chart) | 10,874 tons | 2,523 | 5,584 | 78 | -0- | 138 | 8 | 650 | 270 | 533 | 40 | inapplicable | inapplicable |
| Manufactured bags (excluding waxed & sanitary) | 3,376.57 tons | 1,131.39 tons | 2,411.36 tons | 93.14 tons | -0- tons | 153.14 tons | 7.44 tons | 92.48 tons | 563.81 tons | 873.87 tons | 68.70 tons | 8,834.90 | inapplicable |
| Waxed & sanitary Manufactured bags | 2.16 tons | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | -0- | 2.16 | inapplicable |

*Appendix*

During the years to which we have referred St. Helens produced and sold as a converted paper product a substantial quantity of bags. Its sales of other converted products were relatively insignificant.[6]

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[6] Petitioner has supplied us with Table IV as follows:

"TABLE IV

ST. HELENS' 1952 SALES OF TRADE COARSE PAPERS AND CONVERTED PAPER PRODUCTS OTHER THAN THOSE CLASSIFIED AS CENSUS COARSE PAPER (THE COMMISSION'S LINE OF COMMERCE)

| | Sales In Tons |
|---|---|
| Bags | 9,333 |
| Towels | 1,177 |
| Toweling | 4 |
| Waxed papers (salmon featherweight; bleached; unbleached, and intertolded sealwell; waxed BleKraft butcher) | 441 |
| Fibre can kranila | 609 |
| Hickory cover stock | 159 |
| Raisin tray | 620 |
| Kranila tagboard | 1,848 |
| Snokraft tagboard | 51 |
| Canco converting | 1,844 |
| Salesbook kranila | 330 |
| Filler tape | 21 |
| Fruit and vegetable wrap (including Kranila Safe-T-Wrap) | 169 |
| Linerboard | 408 |
| Total | 17,014 |
| Total Sales, All Grades and Products | 52,516 |
| Total Sales, Census Coarse Paper Grades | 35,502 |
| Percent of Sales Other Than Census Coarse Paper | 32% |

(If the item of bags is added to the Census coarse paper as a part of the relevant market then the total sales including Census coarse paper and bags would equal 44,835 tons or 85.37 percent of St. Helens' 1952 sales. These figures exceed those shown on Chart 1 because they include all sales of all products everywhere.)

*Appendix*

Chart B, showing St. Helens' 1952 sales of Census coarse papers and manufactured bags by state, discloses precisely where St. Helens was a potential competitor. Thus it sold 12,292.97 tons of wrapping paper in that year in the three Pacific Coast states of California, Oregon and Washington. In the same period and area it sold 5,721.53 tons of shipping sack paper, 6,913.32 tons of manufactured bags, and 2,875.22 tons of envelope paper. In that period also it sold substantial, though lesser, quantities of the other categories of what the Examiner called Census coarse papers; and the record justifies the Commission's conclusions that this was not only potential but actual competition. The direction and vigor of that competition we shall discuss hereafter.

Obviously to begin an inquiry as to the relevant market involved here, the initial inquiry must be as to what products St. Helens sold in the competitive market and where those products were sold. All this of course is preliminary to the inquiry which we must reach later in this opinion as to what effect the absorption of St. Helens had upon competition in that market.

It was competent for the Commission in arriving at its conclusion as to the effect of the merger on competition, to confine its consideration of the relevant market, product-wise, to those products which were mainly and principally the products sold by the absorbed company. We know of no rule which would require that the Commission include in its designated relevant product market every item sold by St. Helens regardless of its size or importance. All that the Commission was required to do was to ascer-

tain and find a product line which was sufficiently inclusive to be meaningful in terms of trade-realities. If it were otherwise, it would be a practical impossibility to apply the prohibitions of §7 in the case of an absorbed concern which produced a multitudinous number of inconsequential and minor products. In the statutory phrase "in any line of commerce", the word entitled to emphasis is "any". *Any* line of commerce does not mean the same as the entire line of commerce, or all lines of commerce engaged in or touched upon by the acquired concern.[7] The line of commerce need not even be a large part of the business of any of the corporations involved.[7]

For example, if in the case involving an acquisition of a company manufacturing prosthetic devices it appeared that the company also manufactured and sold a limited quantity of shoes, it could hardly be argued that the relevant market must include or take into consideration all shoe manufacturers.

What we must ultimately get at here is the question whether the effect of the acquisition "may be substantially to lessen competition". In reaching that point the Com-

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[7] Senate Report No. 1775, June 2, 1950, 81st Cong., 2nd sess., U. S. Code Congressional Service, Vol. 2, p. 4297: "It is intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition." See also United States v. Bethlehem Steel Corporation, 168 F. Supp. 576, 595. "The phrase is comprehensive and means that if the forbidden effect or tendency is produced in **one** out of **all** the various lines of commerce, the words 'in **any** line of commerce' literally are satisfied." Van Camp & Sons v. Am. Can Co., 278 U. S. 245, 253.

mission was required to find that the market affected was a distinct and a substantial one. United States v. Du Pont & Co., 353 U.S. 586, 593. We cannot say that the product market here, whether it includes or excludes manufactured bags, did not meet that test.

In arguing that production flexibility creates a market including all coarse papers petitioner asserts that a single paper-making machine, particularly the Fourdrinier machine which is commonly used in all paper mills including St. Helens', is readily adapted or changed to produce other types of paper than the categories we have been here discussing; so that by simple adjustment in the machine it can be made to produce any type of trade coarse paper whether within or without the group selected by the Commission. It is said that a machine one day producing wrapping paper by such an adjustment may the next day be producing bleached paper board and food board. There is a question whether this statement is altogether accurate since it would appear that some such changes would depend upon alterations of or additions to the pulp before it ever enters the machine, but aside from that, we think that this so-called production flexibility upon which petitioner places such importance,[8] is not persuasive here.

The facts of the case show that St. Helens had been in business for a long time, with many established customers and selling through brokerage channels. What was turned

[8] "This admitted fact of production flexibility is the dominant, unifying element for our case, and it requires the inclusion of all trade coarse papers within the product dimension of the relevant market."

out of the Fourdriner machines depended altogether on what orders St. Helens had and what it knew it could sell. What those orders were and what it found a market for were presumably the products which it did sell. A similar contention made by the defendants in United States v. Bethlehem Steel Corporation, supra, was dealt with by Judge Weinfeld as follows: (p. 592) "The evidence establishes that the defendants' production flexibility or mill product line theory is indeed pure theory. In practice steel producers have not been quick to shift from product to product in response to demand. Moreover, the evidence establishes that the continuing relationships between buyers and sellers in the steel industry make such shifts unlikely." And in a footnote the Judge continued: "While the steel producers may be able to shift their production from one product to another, the buyers obviously cannot so shift their purchases. A user of steel sheets cannot make do with bars, rods, pipes or plates. The only flexibility the buyer has is in the choice of the company from which he buys the product he needs. It is just such freedom of choice that §7 is designed to protect and for that reason line of commerce must take into account buyers and uses." Such is the situation here.

Another contention made in support of petitioner's assertion that the relevant market here should include all trade coarse papers without any such limitation as that made by the Commission is that there is a large degree of substitutability in end use between Census coarse paper and other trade coarse papers. Says petitioner: "Uses do not distinguish papers classified within Census coarse paper from other trade coarse papers."

We have great difficulty in following this argument. In the first place, as we have indicated above, if the Commission found that St. Helens produced and marketed within a relevant area large amounts of wrapping paper but comparatively minor amounts of paperboard, it could properly exclude the latter items from the relevant market. The absorption of St. Helens would be unlikely to have an important effect upon competition in respect to a comparatively minor product. However, beyond that, the Commission found that the papers listed by it as a part of its relevant market served different purposes, had different physical characteristics, were composed of different quality paper, and had different end uses than those which petitioner would have included within the relevant market. It seems obvious to us that there are essential and notable differences between flexible wrapping paper on the one hand and paperboard used for shipping containers on the other. The finding of the Commission just referred to was based upon a substantial amount of evidence in the record which supports these conclusions.

Flexible wrapping paper, familiar to shoppers who observe the storekeeper wrap up merchandise for delivery to customers, could very properly be found to have different characteristics, uses and markets than paperboard used for boxes and cartons sold in the crate type container market. Certainly it is not within our competence to undertake to correct the finding of the Commission on this point simply because all these products are made from paper, or because both wrapping paper and paper cartons are used to enclose merchandise. For example, it does not follow that because

shirts and sweaters are both made of cloth and used as clothing, shirts alone could not in a proper case be treated as constituting a separate but relevant market.

Perhaps the most persuasive fact in support of the Commission's classification and its treatment of these Census coarse papers as distinguishable and something different from other coarse papers is the fact that as a practical matter no one in the industry or interested in it or having anything to do with it has any difficulty in distinguishing one type of paper from the other. For instance, no one questions the types or categories of papers produced by St. Helens as shown in the above Chart B relating to St. Helens' 1952 sales by states. The same is true of the types of paper in the similar chart relating to Crown's sales. The Census classification cannot be meaningless—there must be factual differences on which that classification is made; and in respondent's Exhibit 92A, a report by the Stanford Research Institute on "The Future of Paper in the United States", there is a discussion of these Census coarse papers dealing with each item of this category and outlining the production, increase or decrease of production, uses, and demands of each. Thus it notes a decline from 1940 to 1953 of the consumption of wrapping paper; a major increase during the same period in the production of bag paper; and very large increases in use of both shipping sack paper and converting coarse paper. In discussing the increased consumption of shipping sack paper, the study notes how shipping sacks produced therefrom are used mainly for shipment of such materials as fertilizers, cement, lime, salt, plaster, sand, and commercial feeds, flour, sugar, rice and potatoes. Obviously the producers of this study had no rea-

son to assume that these sacks made from shipping sack paper were indistinguishable from corrugated or paperboard cartons. And the authors of the survey obviously considered they were discussing plainly distinguishable and identifiable items.

The effort to establish that all trade coarse papers should be included within the relevant market on the basis of their being substitutable or interchangeable in end use with the products listed under Census coarse paper is, we think, put forward in an effort to apply such cases as United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, and United State v. Columbia Steel Company, 334 U.S. 495. We think that those cases are not relevant here.[9]

The problem which arises in a case involving §7 of the Clayton Act is a very different one. There the Commission must determine "in any line of commerce in any section of the country" what merger may substantially lessen competition, or tend to create a monopoly. As suggested in United States v. Bethlehem Steel Corporation, supra, (note 30, 168 F. Supp. at 593), ". . . when the question is power over

[9] In the duPont case, the defendant, which dealt in cellophane, was charged with monopolizing and conspiracy to monopolize interstate commerce under §2 of the Sherman Act. The Court noted that there were various flexible wrapping materials bought by manufacturers for packaging their goods; that although cellophane differed from the others "from some it differs more than from others". It noted that cellophane shared the packaging market with others in such manner that cellophane accounted for 17.9 percent of the flexible wrapping materials; that duPont had lost considerable portions of this packaging business to other products. It held that cellophane's interchangeability with other materials sufficed to make it a part of this flexible packaging material market which was the relevant market, not cellophane alone.

price, substitute products may be relevant because they can limit that power. The issue under §7 of the Clayton Act is not whether a merger may result in a company having power over price or the power to exclude competition. The issue under §7 is whether there is a reasonable probability of substantial lessening of competition. There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes."

In addition, the contention of interchangeable or substitutable products here is simply not borne out by the facts. In any event the issue under the Act here involved is quite different from that arising under §2 of the Sherman Act.[10] As for the Columbia Steel Company case, supra, that case involved an attack upon an acquisition under §1 of the Sherman Act, and the case represents an application of tests of liability under the standards set by the Sherman Act. The legislative history of §7, both as originally enacted and as amended, discloses that §7 was intended to cover more than was prohibited by the Sherman Act and to cope with monopolistic tendencies in their incipiency and well before they have attained effects which would justify a Sherman Act proceeding. In substance, the purpose of §7 was to get away from the use of the standards applied in the Columbia Steel Company case itself. We are in agreement with the comments of Judge Weinfeld in United

[10] American Crystal Sugar Co. v. Cuban American Sugar Co., 259 F. 2d 524, a case arising under §7 of the Clayton Act, treated the relevant market there as including both beet and sugar cane. There, as the court noted, the two kinds of sugar were for all practical purposes substantially identical.

States v. Bethlehem Steel Corporation, supra, as to the inapplicability of the reasoning of the Columbia Steel Company case in a case arising under §7 of the Clayton Act. (Footnote 34, 168 F. Supp. at 592.)

Nothing illustrates this better than United States v. du Pont & Co., 353 U. S 583, 593. There concededly du Pont produced many finishes and many fabrics of which those sold to General Motors, the customer, represented but a small percent. Thus it is stated the fabric sales to General Motors comprised 1:6 percent of the total market for the type of fabric used by the automobile industry; yet the relevant market was determined to be not coextensive with the total market for finishes and fabrics but coextensive with the automobile industry, the relevant market for automotive finishes and fabrics. Unquestionably the fact that General Motors, the customer, chose to buy these particular finishes and fabrics, sufficiently distinguished them so that they constituted by themselves the relevant market. Here, as the record and the statistics show, the customers of St. Helens, and the customers of Crown, in ordering and purchasing papers designated as wrapping paper, shipping sack paper, bag paper, envelope paper, etc., by that very fact, demonstrate and create a market for those specific products so that they collectively may properly identify the relevant market here involved.

Without here delineating or outlining the very extensive testimony and the numerous exhibits in the record tending to show that these items of Census coarse paper differed in end use and in physical characteristics in the available markets from the other coarse papers, it is sufficient

to say and hold that the findings of the Commission to the effect that they constituted a distinct line of commerce are not clearly erroneous.[11]

In noting that the extent of the relevant market is determined by the products in which the parties actually competed, we are drawn to the conclusion that we should include within that market sales of manufactured bags because, as previously suggested, that was a product which St. Helens produced and sold in substantial amounts. In tonnage it exceeded all other products of St. Helens with the exception of wrapping paper. Thus in the Pacific states alone St. Helens' sales of wrapping paper were 12,292.97 tons; its sales of manufactured bags were 6,913.32 tons; and next in order of tonnage was shipping sack paper, 5,721.53 tons.

Ultimately we must arrive at a conclusion as to whether the taking over of St. Helens might have a substantial effect upon competition in the relevant market and that

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[11] There is no suggestion here, as has sometimes been made, (see In the Matter of Pillsbury Mills, 50 F.T.C. 555, 564, 565), that because the Commission's "specialization and expertise" are peculiarly adapted to its intended task of policy "clarification and completion" our power to review these findings is more limited than our power to review findings of a court. See Davis, Administrative Law Treatise, §29.02. We here apply the same "clearly erroneous" test, in the same manner as if the findings before us were those of a district court. The dual system of enforcement of §7 makes any other treatment unthinkable. As suggested in the Report of the Attorney General's National Committee to study the Anti-trust Laws, p. 148, note 77: "Chaotic consequences might attend the anomaly of subjecting identical trade practices to different legal principles due to fortuitous circumstances determining whether a District Court or the Commission sits as the initial arbiter, in either event subject to appellate judicial review."

necessitates, as we have indicated, an ascertainment of just what part St. Helens had in the market—just how much a factor it was in competition. After we have evaluated St. Helens' place in the whole market, that is to say, what part it had as respects other producers including Crown, we shall deal with the question whether our view that manufactured bags should be deemed a portion of the relevant product market calls for a different conclusion than that reached by the Commission on the basis of its assumption of a relevant market which did not include manufactured bags.

Before moving to another problem in this case, we think some reference should be made to Chart A, above, which sets forth Crown's 1952 sales in tons by state. When the sales of Crown are compared with sales by St. Helens for similar products, it will be noted in some cases that Crown's sales in relation to those of St. Helens do not disclose the same relative proportions as indicated by the statistics of production. As earlier noted, Crown produced 51.5 per cent of all Census coarse papers manufactured in the West while St. Helens' share was only 11 percent, slightly more than one-fifth that of Crown. On the other hand, in sales of envelope paper Crown sold in the Pacific states 3,851.0 tons as against 2,857.22 tons for St. Helens. This is far from a five to one ratio. The reason for this is that Crown converted a substantial portion of its production of such papers; thus, as shown on Chart A, most of its shipping sack paper was converted into sacks. We find no available figures as to sales of shipping sack paper by Crown in the Pacific coast states.

This situation with respect to conversion of these products by Crown does not in any manner minimize the fact of competition between these two companies.[12] The facts were that St. Helens sold these papers to independent converters while Crown converted a larger percentage of its production of these same papers. The result was that Crown, or its wholly owned subsidiary, Zellerbach Paper Company, in selling the converted product was in competition both with St. Helens and the latter's purchasing converters. This is one reason for our previous suggestion that the figures on production were not altogether irrelevant to the question of what competition existed prior to merger.

This brings us to a consideration of what the record shows as to the geographical area of the relevant market. Three possible areas are suggested by the parties or by the Commission in the process of their discussion of this problem. One such "section of the country" might be the Pacific states of California, Oregon and Washington, the Commission adopted the hearing examiner's finding that the eleven western states which we have heretofore called the West constitute a section of the country appropriate for ascertainment of the ultimate question of whether the acquisition of St. Helens might result in a substantial lessening of competition. This was the geographic relevant market selected by the Commission. The Commission did however say "the evidence is likewise sufficient to show that the three Pacific Coast States, California, Oregon and

[12] As we shall see later, the ultimate problem as to the effect of merger on competition is not primarily concerned merely with competition between the merged and the absorbing corporation

Washington, constitute a section of the country, within the meaning of Section 7, for much the same reasons. This is where the great bulk of the domestic sales, of the papers involved, by Crown and St. Helens were concentrated. For the purpose of this decision, however, the Eleven Western States will be regarded as the appropriate section."

Petitioner rejects both of these suggested areas, asserting that the relevant market embraces a substantially larger area and that it includes all states west of the Mississippi River.

We find great difficulty in going along with either party. It is true that two witnesses for respondent testified that Crown's principal markets were in the area west of the Mississippi River.[13] We think that the statistical record of sales fails to demonstrate any convincing factual situation which would require the Commission to accept all states west of the Mississippi River as the relevant market. The only item in the statistics which might point in the direction of petitioner's claim is the fact that Crown sold a very substantial quantity of Census coarse papers in the state of Texas. St. Helens also sold the same papers to the extent of 1223 tons in Texas in 1952.

On the basis of the evidence as to where these products were sold, we are of the opinion that the relevant market

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[13] From testimony of Witness Ticoulat: "Q. . . . In what area, geographical area, did your company compete with the St. Helens Pulp and Paper Co. in the sale of those papers that St. Helens produced? A. In substantially all the areas that we sell in. Q. Which is what? A. Primarily west of the Mississippi and occasionally east, but primarily west of the Mississippi." The same witness added that Crown met St. Helens "very aggressively in the eleven western states."

was in the three Pacific coast states. The statistical record shows that it was in those states that as between these two corporations the most active and extensive competition occurred.[14] In view of the location of the mills of these parties, the three Pacific coast states represent the area which could be best served and supplied by these producers.[15] This advantageous situation to supply the Pacific coast states necessarily operated in a number of ways. All points from Seattle to San Diego could be served more quickly from these mills than from elsewhere. A promptness in supplying orders is a well known factor in advantageous competition. Moreover this three state market is one which, in the language of the Court of Appeals in American Crystal Sugar Co., supra, was subject to common economic forces; it is an area of extraordinarily rapid population growth, with large and growing cities, increasing industrial activities and other growth factors which set it apart from other areas in the west. The availability of alternative water transportation, while little availed of, has operated to furnish peculiarly favorable land carrier rates.

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[14] American Crystal Sugar Company v. Cuban-American Sugar Co., (D.C.S.D.N.Y.) 152 Fed. Supp. 387, 397. "It is here that Colonial and Crystal concentrate their principal sales efforts. The evidence establishes that this contiguous area comprises a relevant market."

[15] American Crystal Sugar Co. v. Cuban American Sugar Co., 2nd cir., 259 F. 2d 524, 529. "[The companies involved] were better situated to supply this territory than other more distant markets, and this locational advantage over refiners having more distant facilities each had sedulously developed by a program of aggressive competition in this area. . . ."

The charts show that St. Helens' sales in those Pacific coast states of Census coarse paper plus manufactured bags aggregated 32,145.42 tons. As previously indicated, (footnote 6, supra,) petitioner computes St. Helens' total sales of Census coarse paper at 35,502 tons and its sales of bags at 9,333 tons, or a total of 44,835 tons. The 32,145.42 tons sold in the Pacific coast states was thus 71.7 percent of all its sales in those categories. This means that the predominant and outstanding market for St. Helens was in this three-state area.[16]

Again we note that the market in which St. Helens competed is of primary significance here because ultimately we are going to have to inquire what was the effect of withdrawing St. Helens as a market factor. All of this means that there is substantial reason for a conclusion that the three Pacific coast states would be properly treated as the area or section of the country in respect to which we are ultimately to inquire as to the tendency to lessen competition.

A further reference to Chart B showing St. Helens' 1952 sales in tons by state will indicate why we have difficulty in following the Commission's determination that the eleven Western states should be included in the geographical relevant market. Those charts show that in that year St. Helens sold no shipping sack paper, bag paper, gumming paper, waxing paper, or other converting

[16] The totals shown in the table in footnote 6, supra, included some sales in distant states such as New York and Texas, and some exports. The remoteness of these areas is the reason they are not included in the relevant "section of the country" here involved.

papers in Idaho, Montana, Nevada, Wyoming, Colorado, Utah, Arizona or New Mexico. It sold no paper products of any kind in that year in Nevada; it sold minimal quantities of manufactured bags in those same states, and no envelope paper in those Mountain states except in Colorado and Utah. In the light of that sort of record it seems to us that we are confronted with great difficulty in understanding how the acquisition of St. Helens could operate substantially to lessen competition in those areas where it apparently did no business before the acquisition. It would seem that there could not possibly be a lessening of a competition that was non-existent in those areas.

What effect our differing view as to the relevant geographic area has upon the final disposition of this case is something we shall discuss later.

We now come to the question whether, on the assumptions we have here made, it could be said by the Commission that "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." To answer it we must necessarily consider what the record shows as to the total competitive picture in this relevant area with respect to these products prior to the acquisition. If the acquisition took out of the market a concern whose total sales and competitive impact was so small relative to all sales and all competition in the market that it lacked real importance, then the acquisition cannot be said to affect competition in a substantial manner. Our purpose therefore is to ascertain what other local or Western producers and competitors there were and what part they had in this market and to what extent producers outside the

West,—from the East, the North and the South similarly operated and competed in this relevant market.

First as to the Western producers: in 1952 there were ten concerns which produced the papers here referred to, but an examination of the total production of the relevant products by these various companies will disclose that only four such concerns could possibly have a substantial part in the competition for sales. The 1952 production of these companies of the papers listed was as follows:

| | 1952 | |
|---|---|---|
| Company | Tons | Percent |
| Crown | 226,430 | 51.1 |
| St. Helens | 53,821 | 12.1 |
| Longview | 77,749 | 17.6 |
| St. Regis | 59,851 | 13.5 |
| Columbia River | 14,700 | 3.3 |
| Publishers | 7,471 | 1.7 |
| Potlatch | 1,400 | 0.3 |
| Inland Empire | 1,008 | 0.2 |
| Fibreboard | 435 | 0.1 |
| Simpson | 287 | 0.1 |
| Total | 443,152 | 100 |

It will be noted that the total production, wholly apart from sales, by all except the first four listed, namely, Crown, St. Helens, Longview, and St. Regis, is relatively small in amount and percentage. Columbia River, the largest of these so-called minor producers, manufactured in two mills, but the record as to what was sold and where is very unsatisfactory. But even if this firm's total production were assumed to represent sales of the relevant products in the market, the whole amount would not be

# CHART C

## 1952 SALES IN THE WEST OF 7 "CENSUS COARSE" PAPERS PLUS MANUFACTURED

| (Chart C) | Crown-Zellerbach | | St. Helens | | Longview Fibre | | |
|---|---|---|---|---|---|---|---|
| | Pacific States | Eleven Western States | Pacific States | Eleven Western States | Pacific States | Eleven Western States | Cac St |
| Wrapping paper | 28,177.9 | 34,410.8 | 12,292.97 | 13,618.72 | 12,512.75 Est. | 16,417 | 4,1 |
| Bagging—Sack paper | 4,006 Est. | 6,264 | 5,721.53 | 5,721.53 | 18,572 | 18,572 | 13,2 |
| Bag paper | 22,417 | 22,417 | 709.61 | 709.61 | negligible | negligible | 3,2 |
| Envelope paper | 3,851.9 | 4,082 | 2,875.22 | 3,321.79 | -0- | -0- | -( |
| Cumming paper | 5,074.4 | 5,074.4 | 695.01 | 695.01 | 441.65 Est. | 587 | -( |
| Kraft paper | 28,121.8 | 28,121.8 | 1,566.75 | 1,566.75 | 371.2 | 371.2 | 2 |
| Other converting" paper | 11,393.9 | 12,437.9 | 1,371.01 | 1,371.01 | 14,864.69 | 14,864.69 | 9 |
| Manufactured bags | 46,973.18 | 55,955.18 | 6,913.32 | 8,834.96 | 4,492.54 Est. | 5,990.05 | -( |
| Totals | 150,297.48 | 169,363.08 | 32,145.42 | 35,839.38 | 51,654.83 | 56,801.94 | 18,8 |

enough to be an important factor in arriving at the conclusions toward which we are directing ourselves.[17]

We now attach Chart C showing 1952 sales in the Pacific states and in the West of the seven Census coarse papers plus manufactured bags by the four larger producers mentioned. A portion of the figures are taken from Charts A and B, supra. The others are explained in Appendix C.

A study of Chart C shows totals for the Pacific states would be as follows (in tons): Crown 150,207.48, St. Helens 32,145.42, Longview 51,054.83, and St. Regis 18,894. We note again that some amounts beyond these figures would represent sales by the minor producers mentioned above, but for the reasons indicated we disregard them for the time being as representing no quantity that would be substantially significant.

With respect to the question of the quantity of sales of the relevant products made in the Pacific coast states from mills in other parts of the country, the record is most unsatisfactory and quite fragmentary, but apparently it is necessarily so. We think, however, that for the purposes of this opinion we can arrive at a figure which is a maximum overall figure for these so-called imports.

The record contains a railway waybill analysis made by the Interstate Commerce Commission designed to show

[17] The evidence shows that a total of 537 tons of wrapping paper sold in 1952 was disposed of as screenings and not sold as regular wrapping paper. It is impossible to make more than a rough estimate of Columbia River's sales in the Pacific coast states.

the quantities of shipments into this area of two of these products, namely, wrapping paper and bags, and the sources from which those products were shipped. The waybills examined cover a period of five years, from 1949 to 1953, inclusive. The analysis was a sampling one only, in that but one percent of the waybills of this character were examined and analyzed. That analysis disclosed that if the samples were fairly representative of the total, then during this five year period 89.1 percent of all shipments of wrapping paper to the Pacific coast states and 88 percent of all shipments of bags to the Pacific coast states originated with the Pacific coast mills; 10.9 percent of the wrapping paper shipments, and 12 percent of the bags, came from other sources.[18]

Of course these figures were taken from rail shipments only; they do not include shipments by water, nor do they include shipments by truck. Because the outside mills are located mostly in the eastern and southern states it is not probable that the shipments from these sources, which we shall call "imports" were transported to any considerable extent by truck. On the other hand, more than offsetting any shipments of imports by water, is the fact that 50 percent of St. Helens' shipments were by truck and therefore not included in the waybill analysis. In addition to this fact, both Crown and Longview made substantial shipments by truck throughout the coast states.

[18] The Commission shows that the projected totals, tonnage-wise, from these samples are probably too high. For example, the totals for wrapping paper shipments from western mills were actually one and one-half times the total production of those mills. Such an error would not necessarily affect the percentages shown, however.

*Appendix*

As noted, this sampling related only to the shipments of wrapping paper and paper bags. There is some evidence that a few of these importers specialized in bags. Thus Hudson Paper Company, one of the largest, shipped far more bags than wrapping paper. But if it be assumed that the percentages for wrapping paper, approximately 11 percent, would be fairly representative of the percentages of other of these coarse-papers, then we might have an indication that 11 percent of all the relevant paper products sold in the Pacific coast states were from imports.[19]

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[19] There is another basis for a further estimate of which Crown could make use although it has not undertaken to do so. Later in this opinion we shall have occasion to refer to a survey report made by the Commission; at that point we will indicate our agreement with Crown that it should not have been received in evidence. Nevertheless, since it was a report prepared by the Commission it would seem that Crown would have been at liberty to use information contained therein as an admission by the Commission itself. If that survey were used in that manner, then its figures might constitute an admission by the Commission as to the purchases of imported products within the market here discussed. Those conducting that survey obtained answers to a questionnaire from some 403 firms in the Pacific Coast states, representing 49.1 percent of the distributors, wholesale grocers and converters in that area. These answers show the products purchased and the source of the purchases over a period of 18 months from January 1, 1952 to June 30, 1953. The figures contained in the answers included purchases of Census coarse paper and manufactured bags. They are summarized in Table 4 (1) of the report. The purchases (in dollars) by these firms from Pacific coast mills aggregated $45,840,200, while those from other suppliers amounted to $3,146,929; that is to say, 6.4 percent of the total came from imports.

Crown might have made use of this figure to controvert the Commission's contention that amounts imported were not significant. But it did not do so, and for reasons explained later, we make no use of it.

*Appendix*

A substantial number of witnesses whom the Commissioner had the right to believe and who were apparently qualified to testify on the matter, did testify that there were not substantial amounts of these relevant paper products imported into the Pacific states during the period here in question. According to their testimony the only firms which in any significant way competed in these products in the Pacific coast states were International Paper Co. and Hudson Pulp and Paper Corp. There was testimony that only International and Hudson shipped kraft paper to the coast. These witnesses explained the reason for this limited competition from outside the area as being due to freight disadvantages in the long haul of these imports. The Commission found that the Western paper mills sold paper F.O.B. mill and absorbed the freight, which of course varied with the distance shipped. Witnesses doing business in the Pacific coast states and buying paper testified that they were deterred from purchasing paper in the East by these higher freight costs. Witnesses also testified to other disadvantages in purchasing paper from the East; one was the time factor required in obtaining deliveries. There was testimony that even if the Pacific coast jobber warehoused his supplies from the East he was still at a disadvantage because when he ran out of some size or type of paper on which quick delivery to a customer was required, there was delay in getting delivery from Gulf or eastern mills, whereas St. Helens could make delivery much more quickly, and so could the other Pacific coast suppliers. There was testimony that the Pacific coast paper jobber was at a disadvantage unless he could obtain a dependable source which provided a com-

plete line of product papers, and the witnesses had difficulty in obtaining that sort of thing from Eastern or Southern mills.

With respect to International and Hudson, the evidence was more specific. The sales agent for Hudson estimated that it sold in this area in 1952 approximately 7,000 tons of bags but only approximately 500 tons of wrapping paper. In that year International sold no wrapping paper in the area. Hudson's shipments were by water.

Mr. Ticoulat, vice-president of Crown, listed some non-Western firms which he stated had sold paper in these categories on the Pacific coast. His testimony is so uncertain and unsatisfactory that it is devoid of useful information.

The Commission found that "sales of paper included in this proceeding in the 11 Western states from producers outside of this area were relatively insignificant." This followed a similar finding by the examiner. We are not sure what is meant by the word "relatively" in that finding. For our purposes, and only to make up the chart which we shall presently include in this opinion, we shall make an estimate based in part upon the 11 percent figure produced by the waybill analysis. The other figures on this chart as to sales by other producers furnish a basis upon which we can compute that 11 percent. This would give us a figure for imports of 32,000 tons. Since this amount is not vital or controlling in our decision, we shall go one step further and make this estimated amount 33,000 tons. As above noted, Crown claims that the amounts of paper sold by producers outside this area "exceeded the sales of St. Helens." We are assuming for the purpose of

the chart mentioned, therefore, this 33,000 ton figure. This, it will be noted by comparison with Chart C, supra, exceeds the sales of St. Helens. Actually there is nothing in the record to support so high a figure.

To complete our promised chart we must make one further estimate which is as to the total amount of sales of the relevant products in the Pacific coast states by the lesser producing firms, that is to say, by firms other than Crown, St. Helens, Longview and St. Regis. The ten mills producing some of these papers have been listed previously. Of the six lesser producers Columbia River was the largest. Its total production was 14,700 tons. As the previous table shows, the production of the other companies drops off rapidly. The sales of these concerns from Columbia River down, in 1952, cannot be accurately ascertained from the record. For instance, an officer of Columbia River testified that the 537 tons of wrapping paper included in its total for 1952 were mostly screenings dumped on the market as carliners and not sold as wrapping paper. Some of its vegetable parchment included in other converting paper was sold in the Imperial Valley of California. Some of its product was exported. Publishers, the next in line, was mostly a newsprint producer selling a comparatively small amount of wrapping paper. The others produced minimal quantities. The total production of all these six lesser producing concerns aggregated 23,900 tons of Census coarse paper. We think it would be a fair estimate to say that half of this or 11,950 tons was sold in the Pacific coast states, and this estimate we carry forward to the forthcoming chart.

*Appendix*

We are now prepared to disclose on the chart the statistics for 1952 sales in the Pacific coast states from all competing sources. These are arrived at in the manner previously described.

## CHART D

1952 SALES OF CENSUS COARSE PAPERS, PLUS MANUFACTURED BAGS IN THREE PACIFIC COAST STATES, IN TONS

| Company | Tons | Percent of Total |
|---|---|---|
| Crown | 150,207 | 50.53 |
| St. Helens | 32,145 | 10.81 |
| Longview | 51,054 | 17.17 |
| St. Regis | 18,894 | 6.35 |
| Other Western Producers | 11,950 | 4.02 |
| Imports from East and South | 33,000 | 11.10 |
| Total | 297,250 | 99.98 |

While this chart shows the already dominant position of Crown prior to the merger, and also shows, percentage-wise, a substantial share of the market in St. Helens, it does not alone tell the whole story. The apparently larger share of Longview must be understood in the light of that company's policy of closed outlets. As noted hereafter, so far as paper jobbers were concerned, Longview limited its sales to one single jobber, Blake, Moffit & Towne, which operated throughout the three Pacific states, as well as Arizona, Nevada and parts of Idaho and Montana. Eighty-five percent of all Longview's paper sold to jobbers went to this firm. The remaining 15 percent was confined to two other jobbers who operated in the Intermountain and Rocky Mountain area, and outside of Blake, Moffit & Towne's district. This meant that so far as independent jobbers were concerned, Longview was not a source

of supply. The record shows that one of the most important groups of buyers of these papers were these jobbers. Their number in this area is not precisely given, but it approached 300. There were "some hundred" paper jobbers at Los Angeles alone.

Later we shall have occasion to comment upon some of the other results of the merger on these jobbers; but in viewing Chart D, we must bear in mind that while Longview's product was generally unavailable to them, St. Helens produced a broad line of all these relevant papers, and was an available source of all of them for these jobbers.[20]

Congress by the use of the words "may be" made it plain that the purpose of the amended statute was to arrest restraints of trade "in their incipiency and before they developed full fledged restraints violative of the Sherman Act." This is further made plain in the legislative history of the enactment where these words are carefully explained. And to accomplish this end it is plain that Congress had to see to it that no dominant operator in any industry should be permitted to frustrate the purposes of the Act by absorbing its rivals bit by bit. Thus the Senate Report noted that acquisitions which substantially lessened competition would be unlawful if they had the specific effect in any line of commerce "whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition." In other words, a substantial lessening of

[20] In contrast note the facts as to St. Regis: as shown on Chart C, its sales of these coarse papers were small with the exception of shipping sack papers.

competition was to be prohibited whether the acquiring corporation accomplished these results by one immense gobble of another large producer or whether it set out to produce the same results by nibbling away at small producers. The Senate Report could not have made this plainer than it did when it defined the problem to which the bill was addressed by quotation of a report of the Federal Trade Commission as follows:

> "Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them * * *
>
> "Where several large enterprises are extending there [sic] power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply. This latter pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rival * * *" (Senate Report No. 1775, June 2, 1950, U.S. Code Cong. Serv. 81st Cong., 2nd Sess., 1950, Vol. 2, p.4297.)

It is most important that we understand just what must be proven in order to warrant the Commission's finding that "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." As we

have previously indicated, the key words here quoted are "*may be*"; in other words, we are dealing with a question of the reasonably probable results of the merger so far as competition in the market is concerned. As stated in United States v. du Pont & Co., 353 U.S. 586, 607, ". . . the test of a violation of §7 is whether, at the time of suit, there is a *reasonable probability* that the acquisition is likely to result in the condemned restraints." (Emphasis added) As the Court stated, the question was whether there was "likelihood" of such result.

In American Crystal Sugar Co. v. Cuban-American S. Co., 2nd cir., 259 F. 2d 524, 529, the court was affirming a decision in which the district court "made findings bearing on the effect which a merger or a common control of the two companies involved would probably have on competition in that line in that market."[21]

When we recall that we are dealing with the question of what is likely to be the result and whether or not there is a reasonable probability of a substantial lessening of competition, some other considerations become important and relevant. As previously suggested, much of the Government's evidence with respect to various paper companies had to do with the volume of their production. As we have noted, Crown took strong exception to the Government's approach

[21] Note the language of Judge Weinfeld in United States v. Bethlehem Steel Corporation, supra, 168 F. Supp. at 603: "The Government is not required to establish with certitude that competition in fact will be substantially lessened. Its burden is met if it establishes a reasonable probability that the proposed merger will substantially lessen competition or tend to create a monopoly. 'A requirement of certainty and actuality of injury to competition is incompatible with an effort to supplement the Sherman Act by reaching incipient restraints.'"

on the basis of production statistics, arguing that the significant question was the volume and place of sales rather than production. Up to this point we have endeavored to ascertain the relevant market both product-wise and with respect to the area of the market on the basis of sales of the various competing companies; and as we have indicated, in that connection statistics of sales are more significant than statistics of production.

However, there is one point which the Commission has made in connection with its production statistics which is not without significance when we come to consider the present problem of reasonable probability and reasonable likelihood of a resultant lessening of competition. It seems to us to be manifest that if the merger here in question materially tends to limit the total productive capacity of the companies remaining in the business as competitors of the absorbing company, that would have a substantial bearing upon the question of likelihood of a lessening of competition or tendency to monopoly.

The Commission noted with respect to each product here involved just what the merger did to production capacity in the relevant area. Thus it is disclosed that in 1952, before the merger, Crown's production of wrapping paper was 57.2 percent of the total tonnage of all companies producing that paper in the West; at the same time St. Helens' production was 21.3 percent. In 1954, after the merger, Crown, with St. Helens now a part of it, had 77.6 percent of the total production for that year while all other companies in the area had a total of 22.4 percent. Such a predominance of production would appear not only to be a threat to possible competition but to approach a monopoly situation.

A substantially similar situation resulted with respect to bag paper. Indeed, by 1954, aside from a minimal production by other companies, Crown's production of 78.9 percent and Longview's production of 17.1 percent made it substantially a two company industry in that field. The record shows that, in respect to shipping sack paper, whereas other companies including St. Helens produced substantial quantities in 1952, by 1954 the shipping sack paper industry had become a three company affair. The same thing resulted in respect to envelope paper. In 1952 Crown produced almost 89 percent of waxing paper, St. Helens 5.7 percent, and four other companies less than 2 percent each. In short, even before the merger Crown was most decisively dominant, and the merger made it even more so.

The particular significance of the figures as to production capacities of various companies in the relevant area is that although those production figures are not statistics as to actual sales, yet plainly a company that has no production or very limited production cannot be said to be a potential seller of size.[22]

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[22] With respect to bag paper for instance the production figures for 1952 were as follows:

| Company | Tonnage | Per Cent of Total Production |
|---|---|---|
| Crown | 77,485 | 68.3 |
| Longview | 21,782 | 19.2 |
| St. Helens | 10,834 | 9.6 |
| St. Regis | 3,270 | 2.9 |
| Potlatch | 9 | * |
| | 113,380 | 100.0 |

* Less than one-tenth of 1 per cent of total production"

The test as to whether the merger produced a "reasonable probability" that it would lessen competition or tend toward monopoly is not an easy one to apply because obviously it involves in a degree the forecasting of the future. The wording of the statute and its legislative history demonstrate that not every merger was intended to be prohibited; in fact, in drafting the amended statute in 1950, Congress made some changes designed to prevent any such conclusion.[23] A mere possibility of a lessening of competition would not suffice; on the other hand, actual proof of injury to or restraint of competition was not contemplated because the enactment was designed to go beyond

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After the merger in 1954 the production figures were as follows:

| "Company | Tonnage | Per Cent of Total Production |
|---|---|---|
| Crown (including St. Helens) | 100,854 | 78.9 |
| Longview | 21,894 | 17.1 |
| St. Regis | 4,144 | 3.2 |
| Potlatch | 713 | 0.6 |
| Weyerhaeuser | 304 | 0.2 |
| Simpson | 22 | * |
| | 127,931 | 100.0 |

* Less than one-tenth of one per cent."

It is on the basis of such production statistics that the Commission asserts that the bag paper production had become for all practical purposes a two company industry.

[23] From the Senate Report: "While on the one hand it was desired that the test be more inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that the bill go to the extreme of prohibiting all acquisitions between competing companies."

the Sherman Act's requirements of such proof and to furnish remedies more readily available.[24]

As was noted in United States v. du Pont & Company, 353 U.S. at 607, often the participants in a merger take such action with the best of motives and with no thought or intention of restraint of trade or monopoly. The Court there said: "It is not requisite to the proof of a violation of §7 to show that restraint or monopoly was intended." In the instant case, Crown may have seen in the acquisition of St. Helens an opportunity to provide itself with a more efficient, more useful set of production facilities. Thus St. Helens was developing a new bleaching plant. Acquiring that plant could save Crown from building a similar plant elsewhere. When a large company increases its size, it has an opportunity to lower its costs of operation; it may by acquiring plants near certain markets save transportation costs. As a concern grows it may accomplish other economies: in purchases, in setting up research and legal staffs, and in increasing its advertising and promotion budgets. Such growth may well result in enabling it to offer its goods at lower prices. That might well be a positive benefit to ultimate consumers.

It is plain however from the Act and its legislative history that concern with such considerations was no part of the Congressional thought. Congress was not concerned about increased efficiency; it was concerned about the

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[24] "[T]he bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect. . . . A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints."

competitor,—the small business man whose "little independent units are gobbled up by bigger ones,"[25] and about other competitors whose opportunities to meet the prices of the larger concern and hence compete with it might be diminished by a merger which increased the concentration of power in the large organization. Thus the House Report described as one of the unlawful effects which the legislation was designed to avoid an "increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive. . . ." H.R.Rep. No. 1191, 81st Cong., First Sess. p. 8, (1949). As stated in the Senate Report, cited above, the purpose of the legislation was "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions."

As the legislation was under consideration by Congress it was duly appreciated that decentralized and deconcentrated markets are often uneconomic and provide higher costs and prices.[26] All this it laid aside in its concern over the "curse of bigness" and the concentration of power in

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[25] The quoted language is from the dissent of Mr. Justice Douglas in United States v. Columbia Steel Co., supra. Obviously it was the majority decision in that case which §7 was designed to avoid.

[26] United States v. Bethlehem Steel Corp., supra, 168 F. Supp. at 617: "In approving the policy embodied in these acts, Congress rejected the alleged advantages of size in favor of the preservation of a competitive system." See remarks in the course of debate in the House, 95 Cong. Rec. pp. 11,486 and 11,496 (1949). This was a choice similar to that in recent agricultural adjustment programs whereby in order to preserve the status of the small family size farm as against the more efficient, large mechanized one, Congress authorized price supports producing higher costs for the consumer.

the nation's markets which Congress thought advantaged the big man and disadvantaged the little one.[27]

Anyone attempting to formulate the tests to be applied in determining whether a given merger is one whose effect "may be substantially to lessen competition, or to tend to create a monopoly" should begin with a reading of the House and Senate reports that accompanied the bill which brought about the amended section.[28] Thus the House Report contained an extensive discussion of the evils of business concentration. It noted 445 corporations owned 51 percent of the country's gross assets. In many great industries three or four firms controlled most of the business. Thus concentration was still increasing, and much of this was through mergers. Small industries, small businesses, were rapidly being wiped out by mergers through which they were being absorbed by big firms. Those in charge of the bill considered that "these mergers are usually the forerunners of collectivism and socialism",[29] and noted the lessons from other countries where opportunity had been vested in the hands of a few: "The result has been that either socialization or a totalitarian form of government has taken over."[30]

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[27] Of course, this economic choice by Congress has been challenged. See Lilienthal, "Big Business: A New Era". But as stated in the Standard Stations case, supra, this is an issue "that has not been submitted to our decision".

[28] H.R. Rep. No. 1191, 81st Cong., 1st Sess., (1949); S. Rep. No. 1775, 81st Cong., 2nd Sess.

[29] Congressman Celler, at 95 Cong. Rec. 11,486, (1949).

[30] Senator Aiken at 96 Cong. Rec. 16,503-4 (1950).

The most certain thing about the case before us is that its facts, in a striking manner, disclose exactly the sort of thing which the Congressional Reports said should be prohibited. This sort of merger was precisely the kind which was portrayed as an evil to be avoided. In considering, then, the meaning of those words, phrased with such generality and lack of concrete specification: "may be substantially to lessen competition, or to tend to create a monopoly", we must assume that this strongly stated purpose of the Reports throws much light upon the meaning of the statutory phraseology. It would be strange indeed if it were to be held that the words of the amended section had no impact whatever upon a typical instance of the evils sought to be cured.

Much has been written concerning the appropriate tests to be applied in enforcing §7. On the one hand the comparatively simple standard based on the merged company's percentage of the market has been suggested,—the rationale applied in Standard Oil Co. v. United States, 337 U.S. 293, where there was involved the exclusive supply contract prohibitions of §3 of the Clayton Act. Although §3 used the same language as does §7 in referring to the lessening of competition and the tendency to monopoly, yet persuasive reasons have been given as to why this so-called "quantitative substantiality" test is not properly applied in a §7 case.[31]

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[31] See Transamerica Corp. v. Board of Governors, 3 Cir., 206 F. 2d 163, 170. "From this decision has come the 'quantitative substantiality doctrine,' a bit of jargon serving as a badge of membership in the antitrust fraternity, or perhaps—like Durrell's Justine—as a wearisome turnstile through which we all must presumably pass.

On the other hand some writers have suggested that the Commission, or the courts, in inquiring into a claimed violation of §7 should examine a multitude of so-called relevant economic factors.[32] As if the average anti-trust trial were not sufficiently complicated at best, some of these suggestions to enlarge the list of "relevant factors" upon which findings were required would tend to make a case of this kind so appallingly complicated that any judge might well wonder whether the controversy was really a justi-

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Transplanted into section 7, the quantitative substantiality doctrine would seemingly imply that any horizontal merger could be struck down on a showing, without more, that the acquired firm sold a substantial share—perhaps some six to seven percent—of the goods in the relevant market." Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 74 Harv. L. Rev. 226, at p. 250 (Dec. 1960).

[32] "Product, geographic, and functional markets identified, it may then become relevant to examine questions like:

(a) What companies buy or sell in the market, how many, and what are the significant differences among them: (i) large, medium, and small (market shares, or rank of large companies, etc.); (ii) degrees of vertical integration; (iii) uses of the product; and (iv) the significance of the product under study in the output or in the purchases of different companies;

["b" is missing]

(c) What methods of sales are used in the market: (i) how are the prices of different sellers related; what of price history; (ii) how free are buyers or sellers to seek new suppliers or outlets; what determines whether changes will be made?

(d) What are the opportunities for entry of new companies or for expansion of existing companies into particular product or geographic markets?

(e) What are the opportunities for innovation in products, in techniques, in methods of sales, etc.?

(f) What types of natural limitations on resources, economies of scale, or special national policies modify the conditions under which companies compete?

ciable one.[33] And it is a bit hard to believe that Congress meant that a business concern contemplating merger must undergo a similar struggle to find out whether its plans may or may not be carried out.

Fortunately we are not called upon here to frame any standards for testing the application of §7 to all possible mergers. Possibly more complicated tests and more extensive economic surveys may be required in some close cases. But we have only this case to decide; and on its facts it is not a close one.

Crown, with its leadership in production and sales of the product-line papers, its great disparity in size as compared

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(g) What is the long-run supply and demand picture and how does it influence the character of competition?

All of such facts cannot and need not be investigated in each case: only those relevant in particular market contexts, and obtainable at reasonable cost, should become a part of the record."

(Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, p. 126.)

We are left in the dark as to what we should do with the answers to all these questions once we have them; what answers would prove the merger good,—what ones prove it bad?

[33] This sort of difficulty was suggested in Standard Oil Co. v. United States, 337 U. S. 293, 310, where the court alluded to a "standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts," adding in a footnote (p. 310, footnote 13): "The dual system of enforcement provided for by the Clayton Act must have contemplated standards of proof capable of administration by the courts as well as by the Federal Trade Commission and other designated agencies. See 38 Stat. 734, 736, as amended, 15 U.S.C. §§21, 25. Our interpretation of the Act, therefore, should recognize that an appraisal of economic data which might be practicable if only the latter were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance."

with other competitors in the area, and its position as a price leader in the market, was already in a dominant position before the merger. Its acquisition of St. Helens could not help but substantially increase that dominance. It significantly added to its concentration of power.

To borrow a phrase from Universal Camera,[34] Congress expressed a mood that acquisition of a rival firm by a larger one, resulting in a substantial increase in the concentration of power in the absorbing concern, is to be prohibited for the reason that such increased opportunity for domination will probably lessen competition or tend to create a monopoly. It is its tendency to concentration of power that condemns this merger.

This alone justified the Commission's finding that the reasonably probable result of the acquisition would be substantially to lessen competition and to tend to create a monopoly.

The record also contains evidence designed to show the practical effects of St. Helens being eliminated as a competitor in this market. St. Helens had a favorable market for its papers with independent paper jobbers. It had a similar market with independent converters. In 1952 Crown and St. Helens were substantially the only sources for sulphate wrapping paper available to independent jobbers. This was because of Longview's exclusive jobber arrangement, mentioned above, because St. Regis then sold none of its small tonnage to jobbers, because Publishers produced only sulphite papers of inferior strength, and because Inland Empire's and Columbia River's wrapping

[34] Universal Camera Corp. v. Labor Bd., 340 U. S. 474, 487.

paper was sold only as screenings. St. Helens, differing from Crown, did not compete with its jobber customers. Crown had its wholly owned paper distributor, Zellerbach Paper Company, which competed with the same jobber buyers. Once St. Helens was eliminated, it was testified by some jobber witnesses, their only source for such paper was Crown. This put them, they testified, at a competitive disadvantage.[35] The Commission concluded that this was so.

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[35] Thus the President of Union Paper Company of California, a paper jobber handling coarse papers, including wrapping papers, testified that prior to the merger he bought a considerable amount of these coarse paper products from the St. Helens mill through Graham Paper Co. which handled them. He explained the advantages of being able to purchase such paper from more than one mill; for example, competitively, one or the other might give more speedy delivery. After the merger he had to buy his wrapping paper from Crown. As a matter of economics, due to freight rates, shipping time, etc., he could not buy from eastern mills; but in buying from Crown he had what he called a disadvantage in selling or reselling paper because the paper he purchased was labeled "a product of the Crown Zellerbach Corporation". This included the name "Zellerbach" which suggested the name of his competitor, Zellerbach Paper Company.

A paper jobber in Portland who dealt in coarse paper also bought from St. Helens prior to the merger as well as from Crown and others. He had not purchased from eastern companies because they did not offer a complete line. He explained the importance to his business of a continuous source of supply in such a complete line. Since the merger he had to buy from Crown although he would have preferred to have alternate sources of supplies. "We feel that a competitive situation improves our service and we found that to be the case." He regarded it as a disadvantage to have to buy from a competitor. He found that since his St. Helens source was lost, it had been difficult to get from Crown the information and assistance which had formerly been available to him from St. Helens.

Another witness testified that after he was unable as formerly to sell his customers paper from St. Helens, his customers were dis-

The Commission regarded the evidence here referred to as proof that in consequence of the merger there had actually been an adverse effect upon competition. The theory of the Commission was that St. Helens had been a firm which had made a useful contribution to competition in the market. Because it did not itself act as a jobber but sold generally to independent jobbers, and because it was not generally a converter aside from paper bags, both converters and jobbers found St. Helens a useful source for their supply of papers of the kinds here involved.

St. Helens' usefulness, the theory goes, was based upon its availability as a dependable source of supply of a wide range of these papers. Because, as we have noted, few producers in the area supplied such a broad line, and because of the finding of the Commission that suppliers outside the West were generally unreliable sources, particularly in view of the recurrent paper shortages, the Commission held: "Clearly, with the elimination of St. Helens, Western jobbers generally have been severely restricted as to sources from which the relevant papers may be purchased. It likewise appears that many converters which formerly could look to St. Helens for purchases of the relevant papers must now depend upon Crown as a primary source of supply, a company which is a major competitor since Crown converts a substantial share of its production." The consequence of this, the Commission stated, was that Crown's position was enhanced by the

satisfied, thinking that they were buying through a middleman and that they had better buy from Zellerbach Paper Company for they knew they were getting Crown Zellerbach Paper. He testified that he felt that because of the confusion in his clients' minds he had lost business.

merger, because by means of its jobber division, Zellerbach Paper Company, "It is now competing with many more jobbers for which it has become a major supplier."[36]

There were other respects in which the Commission asserts the merger operated to the disadvantage of paper jobbers and had harmful effects upon their previously existing competitive opportunities. Thus the proprietor of a substantial paper business in San Francisco testified that prior to the merger his principal source of supply of coarse paper had been St. Helens. He had customers then in Los Angeles, Portland, Seattle and other areas. While St. Helens was operating he was able to supply those customers through deliveries made directly from the St. Helens mill to them. Furthermore, at that time he was able to procure many shipments to those customers by truck and to make deliveries within 60 hours after orders. After St. Helens had vanished and had been taken over, Crown refused to give him that service because of its policy not to ship out of his trading area of San Francisco and vicinity. The only way in which he could supply his old customers outside of San Francisco was to make shipments from his warehouse, which was more costly to him.

The same thing happened with respect to his attempted sales in Portland. There, though the deliveries were only

[36] The Examiner concluded: "As a result of the acquisition, these Western jobbers are in the precarious position of being dependent upon a company as a source of supply which was in fact an active competitor and which could suddenly decide that it wished to make all the profit possible in the sale of paper and dispose of its entire production through its own jobbing division. If the respondent should adopt this policy, it would, in effect, put independent jobbers of coarse paper in the eleven Western States out of business."

two miles from Crown's mill, he had to pay a penalty for having deliveries made in Portland. Asked why he did not buy from International or some one else out of the area, he testified that the time required for delivery and the possibility of running out of some sizes in the interim made purchases from the Gulf ports disadvantageous.

A paper jobber from Los Angeles testified that prior to the merger he bought most of his wrapping paper from St. Helens. Thereafter he bought almost all from Crown. He too testified as to better service, and deliveries directly to his customers from St. Helens, and that Crown refused to make such deliveries. He stated that St. Helens was marked by willingness to cooperate with the independent jobber in matters of that character. Other witnesses testified to the same effect.

Petitioner finds much fault with the conclusions of the Commission with respect to the matters just mentioned. It notes that only a few of the many jobbers in this field testified. It explains the longer period for deliveries on the ground that the witnesses must have been referring to a period of paper shortage. It asserts that St. Helens had exactly the same policy with respect to not making deliveries for jobbers outside their market area where the jobbers maintained warehouses. It refers to some of the witnesses who complained of having to buy now from a competitor as being hostile and contends that their testimony was unconvincing.

All that we can say about this is that the Commission's finding with respect to these disadvantages to jobbers and converters found justification in the record and was sup-

ported by evidence which the Commission had the right to accept. Crown argues that only six of the jobber witnesses testified to these adverse effects on jobbers. If those six who testified had these experiences, then, in the absence of contradictory testimony by others, it can be inferred that the conditions described existed generally. We cannot hold the Commission's findings on this point clearly erroneous.[37]

Crown asserts that the Commission's conclusion as to the increased dominance in the market gained by Crown through the merger, and the consequences of any concentration resulting therefrom, are rendered unimportant for the purpose of ascertaining whether the merger will lessen competition or tend to create a monopoly because of the fact that new paper manufacturing companies have entered the paper and paperboard industry in the West since 1949.[38]

It is not altogether clear just how material prospects of new entrants in the market may be in a case of this kind.

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[37] In United States v. Bethlehem Steel Corporation, supra, the Court places some emphasis upon the fact that Youngstown, which produced rope wire but did not manufacture wire rope, was a desirable source of such wire for an independent wirerope fabricator, and that with the elimination of Youngstown this independent fabricator would have to purchase the rope wire from Bethlehem so that the independent fabricator would thus be having to purchase from a competitor. It has been suggested that this could not be a disadvantage from a competitive standpoint. See Adelman "Economic Aspects of the Bethlehem Opinion," 45 Va. L. Rev. 684, 694. It would appear to be within the competence of the Commission to consider this to be a competitive disadvantage.

[38] The firms here referred to are St. Regis, Weyerhaeuser and Potlatch, listed in the production tables, supra, and Scott Paper Company, Western Kraft Corp., and R-W Paper Co. with mills in Washington and Oregon. Georgia Pacific Paper Company is said to have a mill under construction and International Paper Company is said to be planning to build a coarse paper mill in Oregon.

Perhaps it is doubtful whether a concern like Crown, which has accomplished a merger which under ordinary standards cannot be permitted to stand, can avoid the consequences by saying: "Although we have effected a merger which in the ordinary course would have the prohibited results, yet we cannot be required to undo this merger because the prospective entrance into the market of new competitors will serve to offset the consequences of the merger."[39]

We find it unnecessary to pursue that point, however, for the Commission found against this contention of Crown, and the finding we think has justification and support in the record.[40]

Crown contends that it was denied a fair hearing before the Commission, primarily because of the receipt in evidence of a 338 page market survey, Exhibit 176. It appears that after the complaint was filed in this case, the Commission directed that a survey be made of the coarse paper industry. This survey was then made through questionnaires mailed by the Commission to jobbers and converters in the eleven Western states seeking responses as to their purchases of paper and paper converted products. Crown

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[39] "The loss of a substantial firm, however, may of itself induce a reduction in the vigor of competition. For even if new entrants are coming into the market or concentration is for some other reason declining, there will be one less substantial firm than would have existed but for the merger, and an adverse finding under §7 is predicated on the presumption that competition would have benefited had that firm remained independent." Bok, supra, footnote 31, at 327, note 299.

[40] Said the Commission: "Under the circumstances, it does not appear that new entrants will measurably offset the lessening of competition apparent in this record."

complains that this survey was conducted secretly without any opportunity for it to participate or to make suggestions as to information to be sought or as to persons to be queried. Crown had no opportunity to cross-examine the persons responding to the inquiries or even to inspect portions of the responses which, because they related to trade secrets, were not made available to anybody connected with the hearing. The hearing examiner sustained the objections to this exhibit and to another exhibit summarizing the replies received, but upon an interlocutory appeal the Commission directed that the basic information and work papers be made available to petitioner and remanded the cause for further proceedings. Subsequently certain corrections and deletions were made in the survey in accordance with the rulings of the hearing examiner and the tabulations of replies was received in evidence. Noting these things the Examiner stated: "In view of the questionable probative value of this economic survey, no consideration has been given it in making this decision." Notwithstanding the Commission itself had required the Examiner to admit this exhibit, the Commission in its final opinion appears to have had doubts as to its propriety or its value, and, while declining to strike the exhibit from the record, nevertheless stated: "In the initial decision, the hearing examiner gave the survey no consideration because he believed it to be of questionable probative value. Nor have we relied upon it in making our decision."

In the light of this treatment of the questioned exhibit by both the Examiner and the Commission itself, we must conclude that allowing it to remain in the record has been no more than harmless error. We have disregarded it in

coming to our conclusions in this case. Possibly some portions of it might have been relied upon by the petitioner as constituting admissions on the part of the Commission. Even that does not appear to have been attempted.

Relying upon the rule stated in International Shoe Co. v. F.T.C., 280 U.S. 291, petitioner asserts that at the time of its acquisition St. Helens was in a failing or near bankrupt condition and hence that the acquisition was not prohibited. In support of this contention petitioner asserts that St. Helens' management had been poor and inadequate; that it had obsolete equipment which it could not replace; and that its prospects for survivial [sic] seemed dim.

The evidence shows that for several years prior to the acquisition of St. Helens, it was in the process of rehabilitating, retooling, and rebuilding its mill pursuant to a modernization program. It had some difficulties in financing this program, and as it proceeded changes and reforms were made which resulted in constantly increasing estimates of costs. Throughout this period St. Helens continued production as previously. One of the improvements undertaken was the installation of a bleaching plant furnishing facilities previously unavailable to St. Helens. This portion of the rehabilitation program had been completed before the take-over. The improvement program, first estimated to cost 5 million dollars, as later revised was then estimated to require $8,875,000; still later it appeared that $9,300,000 would be necessary. Arrangements for financing to meet these increased costs had not been completed by August, 1952, when the president of St. Helens died unexpectedly. The directors of St. Helens started nego-

tiations with Olin Industries with a view to selling. The latter did not buy. Thereafter the St. Helens property was offered to and taken by Crown, thus accomplishing the merger here under attack.

It is plain that the circumstances thus relied upon by petitioner demonstrate that operating a paper mill, keeping it up to date, and financing required improvements and rehabilitation is not an easy task. The circumstances would permit a finding that the directors wanted to quit; but the record does not compel a finding that St. Helens was in a failing or near bankrupt condition. Quite the contrary. The finding of the Commission was as follows: "As of December 31, 1952, St. Helens' total assets were $15,223,754, and its net worth was $9,436,441. St. Helens' annual net sales in the 10 year period between January 1, 1943, and December 31, 1952, increased from $5,435,053 to $9,258,508. Its annual net income during the same period increased from $357,754 to $638,534, the latter amount not including proceeds from insurance on the life of the company's late president or credit in connection with the excess profits tax. From 1943 to 1952 St. Helens' earnings per share of common stock ranged from a low of $.66 in 1945 to a high of $3.56 in 1948, with earnings of $2.73 in 1952, which earnings apparently are based on net profits, including the aforementioned excess profits tax refund and the proceeds from the life insurance policy. Beginning in 1929, St. Helens paid dividends in every year except 1932. There are no facts in this record to clearly indicate that St. Helens would have been unable to complete its modernization program. We are of the opinion

that St. Helens had been and was at the time of the acquisition an effective competitor, and that there is no sufficient reason to believe that it was in a failing or bankrupt condition." The record sustains that finding and that disposes of this attempted defense by the petitioner.

This brings us to a final inquiry as to what consequences follow from the fact that the views we have expressed here as to the relevant market differ from those of the Commission. As noted, in our opinion in addition to the several coarse paper items treated by the Commission as constituting the relevant product, the volume of business done by St. Helens in manufactured bags should require that those be added to the product considered relevant. The findings of the Commission did not take that item into consideration. Adding manufactured bags, as shown by the charts which we have incorporated in this opinion, does not make a major change in the statistical record here; the evidence of increased dominance and concentration which we have noted will bear out the Commission's findings whether paper bags are or are not included in the relevant product market. There is no occasion for new findings of the Commission based upon this comparatively minor alteration in the relevant market.

As for the area of the relevant market, we have noted that in our view the appropriate and relevant geographical area to be considered here comprises the three Pacific coast states. This is a more limited and restricted area than that selected by the Examiner and accepted by the Commission. However, what the Commission actually said upon this point was as follows: "The evidence is likewise sufficient

to show that the three Pacific Coast States, California, Oregon and Washington, constitute a section of the country, within the meaning of Section 7, for much the same reasons. This is where the great bulk of the domestic sales, of the papers involved, by Crown and St. Helens were concentrated. For the purpose of this decision, however, the Eleven Western States will be regarded as the appropriate section."[41]

It is possible that in the light of this finding the Commission was saying that in any event whether the geographic dimensions of the market be taken to be the eleven states of the West, or the three states on the Pacific Coast, the acquisition was one which might have the consequence of lessening competition or tending to create a monopoly in either area or in both of them.

It is implicit in the whole approach of the petitioner that if the relevant market area is larger there is less likelihood of lessening of competition or of monopolistic tendencies.[42]

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[41] In United States v. Bethlehem Steel Corporation, supra, 168 F. Supp. at 603, the court found relevant markets in certain listed products in "(a) the United States as a whole, (b) the northeast quadrant of the United States, (c) Michigan, Ohio, Pennsylvania and New York, (d) Michigan and Ohio, (e) Michigan and (f) Ohio." One rather bitter commentator on that opinion stated: "One may be excused for guessing that this picking and choosing of market definition was done to make the decision proof against reversal—no matter what the Supreme Court chose to call the market, the district court would already have done it, made the appropriate finding, and declared the merger illegal." Adelman, "Economic Aspects of the Bethlehem Opinion," 45 Va. L. Rev. 684, 694.

[42] Thus Crown argues that the Commission's relevant geographic market was too narrow, "thereby exaggerating the importance of St.

For this reason petitioner has argued that the relevant market area here should be all states west of the Mississippi. But since the Commission has found that treating the eleven western states as the relevant geographic market, the merger offends the statute, then *a fortiori* it offends the statute if the more limited three Pacific states area is deemed the relevant market. For this reason we find no occasion here to remand for further findings since our views would lead to no different result.

The order of the Commission is affirmed.

(Endorsed)* Opinion Filed June 5, 1961.

Frank H. Schmid, Clerk.

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Helens and excluding from consideration many of St. Helens' and Crown's competitors."

It also says: "The decision of the Commission depends on its narrowly confining the relevant market to 'Census coarse paper' produced in the 11 western states. * * We may take it as conceded by the Commission that there was no violation of Section 7 if the market is actually a broader one in either its product or geographic dimensions."

## [COURT'S] APPENDIX A

### Source of Sales Data on Chart "A"

These figures are compiled from Commission Exhibits 36A to Z, all bound in Exhibit Volume IV. It shows purchaser, place of delivery and quantity, in tons, of each sale by Crown of the various paper products. With the exception of shipping sack paper, the chart includes sales to Zellerbach Paper Co. and to Crown's Western Waxed Paper Division and Western Gummed and Coated Products Division. (Crown's brief describes Zellerbach Paper Co. as its "second largest customer" for Census coarse paper.) These are included in order truly to reflect the total market impact and the competitive situation with respect to the product items. Tissue papers listed on the wrapping paper pages are not included on the chart. Waxing and Gumming papers are carried (p. 2316) as a single item, but have been sorted out by us on the chart by identification through the names of purchasers. "Other converting" paper sales charted include foil laminating paper (p. 2311), laminating and oiling papers, (p. 2316), vegetable crate liners (pp. 2317-2318). Shipping sack paper sales are not shown on this exhibit. The figure shown on the chart for shipping sack paper is from Crown's opening brief, p. 33.

### Comparison With Totals in Briefs of Parties.

When the totals on this chart are checked against the totals asserted by the parties in their briefs, we find that those given in the Commission's brief closely correspond to our calculations. (See right hand column). Crown's

claimed totals (fourth line from bottom) do not correspond. This is in part because they omit "other converting" and all sales to Zellerbach Paper Co. and the Western Waxed Paper and Western Gummed and Coated Products Divisions. But even making these adjustments, Crown's totals are too small. This error may be sampled by checking the total Crown gives for sales in Nevada (27 tons) against the figures shown on pages 2281, 2284 and 2291 of these Exhibits. They show a total of sales in Nevada to independents only, exclusive of Zellerbach Paper Co. of 109.40 tons. A similar set of errors does not appear in Crown's totals as to St. Helens on Chart B.

## [COURT'S] APPENDIX B

### Source of Sales Data on Chart "B"

These figures of St. Helens' 1952 sales were compiled from Commission's Exhibit 117, bound in Exhibit Volumes XVIII and XIX. It reports sales by reference to trade names of paper. Their categories (wrapping paper, bag paper, etc.) were determined from the testimony of witnesses. Place of sales was determined from addresses of buyers.

The figures in the exhibit are in pounds. These were converted to tons by dividing by 2000, and the figures on Chart "B" are the result. The cross-check with briefs of the parties, as disclosed by the chart, shows a close tally in each case except for "other converting" papers.

## [COURT'S] APPENDIX C

### Source of Sales Data on Chart "C"

As to Longview: Sales are estimated from production figures on the basis of testimony of the firm's president. Substantially all bag paper was sold on the Atlantic coast. Hence no sales of this item appear on this chart. Shipping sack paper was sold to converters which were in the three coastal states. Longview converted "between 25 and 30 per cent" of its bag paper, waxing paper and asphalting paper. Hence manufactured bag sales were computed at 27.5 percent of production. All were sold in the 11 Western states. Sales of waxing paper were estimated at production less 27.5 percent. Though very limited amounts of wrapping and gumming paper were sold in Texas, substantially all of these products were sold in the 11 states mentioned. Though at the date of this testimony "some" sales were made to converters in South Africa and Trinidad, these are ignored as those sales had not "been a feature of our business very long". It does not appear that they dated back to 1952.

As to St. Regis: All of this firm's production of the relevant papers was at its Tacoma mill. The detailed production of that mill in the course paper line is in CX 130A-B, Exhibit IX, pp. 3491-3492. The mill converted 75 percent of its production of shipping sack paper, so sales of that item are only 25 percent of production. It converts none of its bag paper and its sales of that item were mostly to the Los Angeles Bag Company. It sold the 90-lb. cup stock in the East, so that item wasn't in-

cluded in "other converting", for purposes of this chart. The rest of its coarse paper, including production was sold "primarily on the West Coast"; that seemed to cover the sale of its whole production of wrapping and waxing papers. Its Western production of shipping-sacks was also sold "mainly on the West Coast." From this apparent sales pattern it was estimated that all sales which St. Regis made in the West were made in the three Pacific coast states.

Concerning certain estimated figures in Chart C:—It will be noted that three of the figures in the "Longview Fibre" column, and one in the "Crown-Zellerbach" column are indicated to be estimates, thus: "Est." The reason for this is as follows: The record shows that Longview sold in the eleven western states (which include the Pacific coast states) 16,417 tons of wrapping paper, 587 tons of gumming paper and 5,990.05 tons of manufactured bags. It does not show what portion of these amounts were sold in the three Pacific coast states. We think a reasonable estimate of that portion would be three-fourths of the whole. The inserted estimated amounts are arrived at in that manner. Chart "A" shows why a similar estimate is made as to Crown's Pacific coast states sales of shipping sack paper. This latter figure is an underestimate, since, as Chart "A" shows, it did not include sales to Zellerbach Paper Co. In our view, the final conclusion drawn by us from these charts would not be altered whether we computed the estimated amounts as two-thirds, four-fifths or nine-tenths.

*Appendix*

# UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

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|---|---|
| CROWN ZELLERBACH CORPORATION, *Petitioner,* vs. FEDERAL TRADE COMMISSION, *Respondent.* | No. 15,904 Dec. 22, 1961 |

ON PETITION OF CROWN ZELLERBACH CORPORATION FOR REHEARING.

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Before POPE, MAGRUDER and MERRILL, Circuit Judges.

POPE, Circuit Judge.

After Petitioner filed its petition for rehearing the Commission sought and was granted time within which to make reply thereto. We find in the petition no reason why our original opinion should not stand or why a rehearing should be granted. We do find statements which indicate a failure fully to understand the import of our decision, and because of that, we take this occasion to comment upon certain of the contentions made.

The first is that instead of affirming the Commission's order, this court should have set it aside. This is said to be required by the rule stated in Securities Comm'n v. Chen-

ery Corp., 318 U. S. 80.[1] It is asserted that this court has affirmed the Commission's order on grounds other than those adopted by the Commission,—that we have held that the Commission "erred in its basis for decision." That contention discloses a misunderstanding of the import of our decision.

While our opinion supplied from the record charts of statistics which, in our view reinforced and supported the Commission's findings, we have in no manner disapproved or rejected the Commission's bases for its decision that "the effect of this acquisition may be substantially to lessen competition or tend to create a monopoly", that at the time of acquisition Crown had "a predominant share of the market", that by the acquisition Crown increased significantly its size in the market "in which it already had a commanding lead", and that the result was the removal from

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[1] In Chenery the Court noted that in reaching the order there under review the Commission stated that it "was merely applying 'the broad equitable principles enumerated in the cases heretofore cited.'" The Court held: "The cases upon which the Commission relied do not establish principles of law and equity which in themselves are sufficient to sustain its order." The Court explained its decision when the case came up for the second time, (Securities Commission v. Chenery Corp., 332 U. S. 194, 196), saying: "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

the supplier market of "an important, fully integrated competitor" with "fully developed sales outlet to the trade." Our tabulations assigned to Crown 50.53 per cent of the market, and to St. Helens 10.81 per cent which confirm the substantial accuracy of the Commission's results, taken from production records, of 51.5 per cent and 11 per cent respectively.

It is true, also, that we found the relevant market, area-wide, to be the three Pacific Coast states, but we noted that the Commission, while choosing a wider market, had also found the evidence "sufficient to show that the three Pacific Coast states . . . constitute a section of the country, within the meaning of §7".[2] We had thought that our decision made clear, particularly in the last four paragraphs of the opinion, that we were but adopting and reenforcing the *ratio decidendi* of the Commission.

Petitioner challenges the statistics used to make up the several charts contained in our opinion. With one exception, which we shall note shortly, we continue to hold that the statistical situation presented in those charts is correct and that petitioner's attempted alterations thereof are wrong and without basis in the record.

This challenge of our charts is in any event without any real significance for even after petitioner's attempt to revise our Chart D, it still comes up with a figure showing Crown to have had 35.5 per cent of the total market; and

[2] While adding manufactured bags to our product market we stated: "We cannot say that the product market here, whether it includes or excludes manufactured bags, did not meet that test."

whether Crown's share was 50.53 per cent, as our Chart D showed it to be, or 35.5 per cent as per petitioner's revision of the Chart D, the conclusion reached by us is not altered. We said "Crown, with its leadership in production and sales of the product-line papers, its great disparity in size as compared with other competitors in the area, and its position as a price leader in the market, was already in a dominant position before the merger. Its acquisition of St. Helens could not help but substantially increase that dominance. It significantly added to its concentration of power." Even if we were to accept petitioner's revised figures, we would be obliged to say the same thing and to reach the further conclusion that the acquisition would probably result in a substantial lessening of competition and tend to create a monopoly.

After a careful examination of the computations now brought forward in the petition for rehearing, we are of the opinion, previously expressed, that the statistics of sales furnished in our charts are substantially correct.[3]

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[3] To illustrate the approach which petitioner makes with respect to these sales statistics we refer to petitioner's discussion of its manufactured bags. Petitioner says the figure shown in our Chart C should be "not more than 37,978 tons" rather than the 46,073 tons disclosed in the chart. The latter figure is compiled from Chart A. This assertion by Crown is evidently based upon its application of a stated percentage of an item of 54,910 tons of **bag paper** listed in a tabulation in the Commission's brief under the heading: "Unsold or Consumed Production". As disclosed in our Appendix A, the sales data in Chart A were compiled from Exhibits 36A to Z; Crown's bag sales in 1952 in the three Pacific Coast states appear on various pages from 2353 to 2378 of Exhibit Vol. 4. The totals shown on Chart A are taken from that source and computed with the aid of an adding machine.

Another calculation which we find ourselves unable to accept is petitioner's bringing forward of what is plainly a highly inflated

We do note one alteration which should have been included in Chart D. There should have been a reference to the Los Angeles Paper Bag Co. and its production of bags. Petitioner makes a calculation from which it concludes that sales of 15,703 tons of manufactured bags should have been added to the totals of the relevant product sold in this market. We doubt if this company's sales were so high. But if we were to modify Chart D by including that amount as sales of manufactured bags, our Chart D would show Crown's percentage of the total to be 47.99 per cent and St. Helens' percentage to be 10 per cent. The ultimate result is no different.[4]

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calculation of the amounts of product-line papers sold in the Pacific Coast states from non-western mills. We find in the petition for rehearing nothing whatever to alter our view expressed in the opinion that there is nothing in the record to support so high a figure as the 33,000 tons amount which we inserted in our Chart D. The record abounds in evidence which confirms our conclusions that the imports from East and South were not of a size or quantity significantly to affect the results of the merger in the competitive situation which we have described in our opinion. Some of this is noted in the opinion where we referred to what happened to jobbers after the elimination of St. Helens as an independent supplier. These jobbers found themselves at a disadvantage not merely because they had to get their supplies from their competitor, but also because no satisfactory supplies could be procured from outside the Pacific coast area due to the time factor in obtaining deliveries which had to be made in spite of freight disadvantages in the long haul. The portion of petitioner's Stanford Research Institute's exhibit dealing with interregional movements of paper, including Table 75, indicates that the difference in coarse paper consumption and production in the western region taken as a whole is minimal. This suggests the impossibility of imports from eastern or southern sources amounting to any such figure as that asserted by petitioner.

[4] In any event the competition of Los Angeles Paper Bag Co. lacks the significance attaching to St. Helens' competition, for this company purchased its bag paper almost exclusively from Crown.

The fact is that no combination of figures of production or sales found in this record can possibly modify or alter the basic findings of the Commission and of this court that prior to the merger Crown's position in the market was a dominant one; and that after it had absorbed St. Helens, which was practically the only real and substantial producer in a position to compete with Crown, all up and down the line, Crown's dominance of the market became overwhelming. This is true whether our computation of sales or that of Crown is to be accepted; for we cannot ignore what the merger did to production capacity in the relevant area as noted in our opinion. We cannot ignore the substantial testimony of jobbers and converters as to what happened to them after the merger when they lost their independent sources of supply from St. Helens, and had to look to Crown and its subsidiaries, which competed with them in their jobber and converter fields, for their supplies.

Finally, the petition for rehearing asserts that our decision is contrary to certain cited cases. We have difficulty in understanding why such cases are mentioned. Thus Feil v. Federal Trade Commission, 9 cir., 285 F. 2d 879, has no resemblance whatever to this case aside from the fact that the respondent there was also the Federal Trade Commission.[5] We also find difficulty in understanding why the petitioner cites Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, a case which clearly bears no resemblance to the present one. We have concluded that petitioner has cited it because the Tampa Electric case

[5] That was a case reviewing an order of the Commission requiring a concern to cease and desist from certain advertising.

cited United States v. Columbia Steel Co., 334 U.S. 495. Evidently the suggestion is that thereby the Court reapproved the Columbia Steel decision. But the Court in the Tampa Electric case cited Columbia Steel on a very limited point, namely, the point that foreclosure from 3 per cent of a market is not sufficient to injure a seller's competitors. Our original opinion adequately discloses why, in our view, the decision of the court in the Columbia Steel case is not pertinent here. (See the portion of our opinion following reference to footnote 10 and also our footnote 25.)

The petition for rehearing is denied.

(Endorsed) Opinion Filed Dec. 22, 1961.

Frank H. Schmid, Clerk.

*Appendix*

III. DECREE

(Endorsed)
Filed JAN 29 1962
Frank H. Schmid,
Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| CROWN ZELLERBACH CORPORATION, Petitioner, v. FEDERAL TRADE COMMISSION, Respondent. | No. 15,904 |

FINAL DECREE AFFIRMING ORDER OF DIVESTITURE

Petitioner herein having filed in this Court on February 26, 1958, its petition to review and set aside an order of divestiture issued against it on December 26, 1957, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of CROWN ZELLERBACH CORPORATION, a corporation, Docket No. 6180;" and a copy of such petition having been served and respondent having thereafter certified and filed herein, as required by

the Clayton Act, a transcript of the record of such proceeding; and the matter having been heard by this Court on January 14, 1960, and this Court having thereafter fully considered the cause and having rendered its decision on June 5, 1961; and petitioner having filed on August 4, 1961, a petition for rehearing and said petition for rehearing having been denied on December 22, 1961:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by this Court that the petition to review be, and it is hereby, denied, that the order of the Federal Trade Commission entered in the above-entitled cause be, and it is hereby, affirmed.

By the Court:

WALTER L. POPE

CALVERT MAGRUDER

CHARLES M. MERRILL

United States Circuit Judges

Entered:

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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 800

CROWN ZELLERBACH CORPORATION, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinions of the court of appeals affirming the order of the Federal Trade Commission (Pet. A9–A75) and denying rehearing (Pet. A76–A82) are reported at 296 F. 2d 800 and 834, respectively. The opinions and orders of the Federal Trade Commission (R. 36–51, 547–600, 603–623)[1] are reported at 51 F.T.C. 1105 and 54 F.T.C. 769, 798.

[1] References to the record in the court of appeals are designated as "R". The exhibits introduced by the Commission and petitioner in the court of appeals are referred to as "CX" and "RX", respectively. Reference to an exhibit is followed by the number of the volume of the record in which it is printed (in Roman numerals) and the page on which it is located, *e.g.*, CX 168c, R. XIII–4051.

## JURISDICTION

The opinion of the court of appeals affirming the Commission's order was issued on June 5, 1961 (Pet. A9), rehearing was denied on December 22, 1961 (Pet. A76), and the court entered final judgment on January 29, 1962 (Pet. A83). The petition for a writ of certiorari was filed on March 16, 1962. The jurisdiction of this Court is invoked under 15 U.S.C. 21 and 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, on review of a Federal Trade Commission proceeding to determine whether there had been a violation of Section 7 of the Clayton Act, a court of appeals which "in no manner disapproved or rejected the Commission's bases for its decision" committed error by reinforcing the conclusions of the Commission with its own parallel conclusions on the basis of the record before it.

2. Whether the court of appeals erred in holding that it was harmless error for the Federal Trade Commission to have received in evidence a survey upon which it did not rely in reaching its decision.

3. Whether the Commission abused its discretion to formulate appropriate relief by requiring Crown (a) to divest St. Helens as a competitive entity in substantially its operating form at the time of the acquisition, and (b) to include, as part of the property to be divested, St. Helens' timberlands.

## STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended by 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

## STATEMENT

The petition seeks review of a judgment of the court of appeals affirming a decision of the Federal Trade Commission that the acquisition in 1953 by Crown Zellerbach Corp. ("Crown") of the St. Helens Pulp & Paper Co. ("St. Helens") violated Section 7 of the Clayton Act, 15 U.S.C. 18. The Commission's order, which the court affirmed, required Crown to divest itself of all the assets, properties, rights and privileges that it obtained as a result of the merger, together with so much of the improvements made at the acquired plant as may be necessary to restore St. Helens as a competitive entity. The pertinent facts are as follows:

### 1. THE COMPANIES INVOLVED

*Crown.* Crown, in 1953, before the merger, was the largest pulp and paper manufacturing company in the

Western states[2] and one of the largest in the entire United States (R. 421, 549). Its production facilities consisted primarily of five mills in Washington and Oregon which had a combined capacity for making 2,165 tons of paper a day (R. 550–51; CX 4, R. I–1741–42). These mills produced paper in each of the three industry-recognized categories, *i.e.*, newsprint, fine paper and coarse papers (Pet. 10; R. 557–58).[3]

The trade category of coarse papers consists of various types of papers which have been grouped and classified by the Census Bureau.[4] Included in the Census category of coarse papers are wrapping, shipping-sack, bag, envelope, gumming, waxing and other converting papers (Pet. A14; RX 62 pp. 38–42 (separately bound)), which collectively constituted about 50% of Crown's total production of trade coarse papers (R. 614; RX 62, pp. 28–33). In 1953, Crown's production in the Census category of coarse papers amounted to 51.5% of the total of such papers produced in the West (Pet. 12; R. 573–74). Of its total

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[2] For the purposes of this proceeding, the Western states include the three Pacific Coast states of California, Oregon and Washington, and the eight Mountain states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming (R. 609 n.4).

[3] Since "St. Helens did not produce newsprint or fine paper" petitioner has "agreed that these products are not relevant here" (Pet. 11).

[4] The Census breakdown of trade coarse papers consists of the following classifications: coarse paper (called below "Census coarse paper"), special industrial paper, sanitary tissue stock, tissue paper, container board, bending board, nonbending board, special paperboard stock and cardboard (Pet. A14).

domestic sales of these products, from 80% to 85% were made in the West (R. 579, 612, 1568–69; CX 36, R. IV–2277–2318), with the great bulk concentrated in the three Pacific states (R. 579–80, 612; CX 36, R. IV–2277–2318).

Crown is also engaged in the manufacture of many converted paper products and uses a substantial portion of the paper it produces in such converting operations (R. 551, 1582, 1800–01; CX 4, R. I–1735). For example, Crown converted more than 70% of its total production of bag paper into manufactured bags (CX 36–Z, R. IV–2307–08; RX 62, pp. 28–29) and it sold about 55,955 tons of bags in the West during 1952 (CX 167, R. XIII–4047; see Chart C facing Pet. A39). Through its wholly owned jobber subsidiary, Zellerbach Paper Co. ("Zellerbach"), Crown was one of the largest merchandisers of paper products in the Western states (R. 554, 1924; CX 167, R. XIII–4045–48). Crown therefore competed both with independent converters, and with independent jobbers at retail (R. 591, 616, 1360–61, 1428–29, 2444). In addition, Crown owned or controlled extensive forest lands in the United States (500,000 acres in Oregon and Washington (R. 552; CX 4, R. I–1740)) and Canada (920,000 acres (R. 553; CX 12, R. III–2039)).[3]

[3] In 1953, Crown also owned or controlled several Canadian corporations engaged in the manufacture of pulp, paper and paper products (R. 553–54; CX 4, R. I–1735, 1743–44), and during the pendency of this action acquired the fully integrated Gaylord Container Corp. which operates throughout the Southwest, South and East (R. 555; see CX 183, R. XIII–4097–98). It was then also preparing for production in a California mill which had a potential capacity of 310 tons per day (Pet. A11; R. 551). Up to 1956, Crown also owned

*St. Helens.* The acquired company, St. Helens, was the third largest manufacturer of Census coarse papers in the West; in 1953, it had 11% of the total Western production (Pet. 12; R. 574). Its mill, located in Oregon, had a daily capacity of 180 tons (Pet. 7; R. 558), and at the time of the merger St. Helens was engaged in an extensive modernization and expansion program (which it began in 1948) designed to increase its capacity and modernize its facilities (R. 559–61; CX 51, R. VII–2835–37).[6] St. Helens' entire production was of trade coarse papers, 84% of which fell into the Census category of coarse papers (R. 573; RX 62, pp. 28–33). Of its total domestic sales, 85% were made in the eleven Western states (R. 580, 612; 2018–19; CX 56, R. VII–2865–71), with the vast majority concentrated in the three Pacific states (*ibid.*). St. Helens converted only an insignificant portion of its production of coarse papers other than bag paper[7] (R. 2007) and was the

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50% of the voting stock of Fiberboard Products, Inc., a large Western manufacturer of paper products (R. 421, 554–55).

[6] St. Helens was a fully integrated company owning, in addition to its mill, 117,000 acres of timberland in Oregon and Washington (R. 558; CX 4, R. I–1755). It sold its paper through its exclusive sales agency, the Graham Paper Co. (*ibid.*).

[7] St. Helens converted the greater part of its production of bag paper (R. 2037, 2043–49; CX 117, R. XVIII–XIX) and ranked second among Western producers in sales of manufactured bags (Chart C facing Pet. A39). This large-scale converting operation was in part necessitated by the fact that the only nonintegrated grocery bag manufacturer in the West, Los Angeles Paper Bag Co., purchased its bag paper almost exclusively from Crown (R. 1471; see R. 1473, 1480–81) and made only infrequent spot purchases from St. Helens (R. 2557–58).

only substantial non-competing supplier, of coarse wrapping paper to independent Western jobbers (*e.g.*, R. 1429, 1752, 2451, 2612) and of shipping-sack, envelope, gumming and waxing papers to independent Western converters (*e.g.*, R. 1411–12, 1460–63, 2126–27, 2542–43, 2574–75).

*The Merged Company.* In 1953, as above stated, Crown accounted for 51.5% of the Census coarse papers manufactured in the West and St. Helens, 11.0%; together they had 62.5%. In 1954, after the merger, the share of Crown (including St. Helens) increased to 64%, 53.2% attributable to Crown's facilities and 10.8% to St. Helens' (R. 577; CX 168c, R. XIII–4051). Crown (including St. Helens) was by far the dominant paper company in the West. Of the remaining 36%, Longview Fibre Co. produced 17.6%, St. Regis Paper Co. contributed 12.3%, and six firms shared the remaining 6.1% (*ibid.*). Moreover, the merged company's predominance in the production of several of the various types of papers constituting the Census coarse paper line was even greater. As an illustration, in 1954 it manufactured 77.6% of the total Western production of wrapping paper with the remaining 22.4% divided among 7 producers (CX 168c, R. XIII–4051), the largest of which, Longview (12.5%), sold to only three specific jobbers (R. 578, 1381–96, 1752–54).*

*Of the remaining Census coarse papers, Crown (including St. Helens) produced 78.9% of the total Western production of bag paper; 89.5% of the production of waxing paper; 87.7% of the production of gumming paper, with Longview contributing the remaining 12.3% (CX 168c, R. XIII–4051). In addition, the merged company produced 51.7% of the total Western production of envelope paper with 45.3% of the re-

## 2. THE DECISIONS BELOW

*The Commission's Decision.* In his initial decision, after extensively analyzing the statistical and testimonial evidence in the record and making preliminary findings of fact (see R. 548–86), the hearing examiner concluded that the merger of Crown and St. Helens violated Section 7 (R. 598) and ordered divestiture (R. 598–600).[9]

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mainder manufactured by Columbia River Paper Co. (*ibid.*), whose product was made by a different process and was not fully competitive with Crown's (R. 2051). Crown was also a substantial producer of shipping-sack paper; its 37% of the total production market in 1954 ranked second only to St. Regis and was 10% greater than its 1952 market share (compare CX 168a, R. XIII–4049 with CX 168c, R. XIII–4051).

[9] During the hearing, counsel supporting the complaint offered in evidence a tabulation of the replies of Western jobbers and converters to survey questionnaires sent to them by the Commission pursuant to Section 6 of the Federal Trade Commission Act, 15 U.S.C. 56 (R. 583–84). The hearing examiner sustained objections to this document on the ground that the information contained therein had not been made available to petitioner for use on cross-examination (R. 584). An interlocutory appeal was taken to the Commission, which held that "the basic information collected * * * and the work papers used in compiling the Survey * * * shall be made available to [Crown] and its counsel, at such reasonable times and places as may be determined by the hearing examiner" (R. 50), except that "[n]o information * * * that can be identified with reporting companies shall be admitted into the public record" (*ibid.*). The survey tabulation (CX 176), but not any of the answers to the questionnaires, was introduced in evidence (R. 585–86). However, all of the answers and work papers, except an analysis of Longview's sales operations (see p. 27, *infra*), were turned over to petitioner (R. 943–44, 967–72). "[I]n making [his] decision," the examiner gave "no consideration" to the survey tabulation, and the Commission disclaimed reliance thereon (R. 620).

The Commission affirmed the examiner. The various papers falling within the Census category of coarse papers were held to constitute the appropriate line of commerce in which to test the effect of the merger (R. 611–12). The appropriate section of the country was found to be the eleven Western states (R. 613). In addition, the Commission considered the evidence "sufficient to show that the three Pacific Coast States * * * [likewise] constitute a section of the country" (R. 613). The Commission found that shipping costs and other factors effectively separated the West as a competitive area and that producers from outside the area sold there a "relatively insignificant" amount of product-line papers and were "generally unreliable sources" of supply (R. 613, 616).

Turning to the effect upon competition, the Commission found: First, that the merger eliminated "an important, fully integrated competitor having its own timber reserves, pulp manufacturing and converting facilities and fully developed sales outlet to the trade" (R. 615). Second, that the merger "increase[d] significantly the size of [Crown] in the relevant line of commerce in which it already had a commanding lead" (R. 615–16). Third, that elimination of St. Helens severely restricted the sources of supply available to Western jobbers and converters and compelled many of them to rely upon their competitor, Crown, thus "additionally enhanc[ing]" Crown's position (R. 616–17).[10] The Commission concluded that

[10] The Commission further found that the lessening of competition would not be offset by new entrants into the market or by shifts into production of coarse papers by firms having

the effect of the merger "may be substantially to lessen competition or tend to create a monopoly in the relevant line of commerce and, as such, is in violation of Section 7 of the Clayton Act" (R. 618–19). Crown was ordered to divest itself "of all assets, properties, rights and privileges, including * * * timberlands, cutting rights [and] timber" that it obtained as a result of its acquisition of St. Helens, and of so much of the improvements it had added to the St. Helens plant as may be necessary to restore it "as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition" (R. 603–04), and to submit a plan for compliance (R. 605).

*The Decision of the Court of Appeals.* On review, the Court of Appeals for the Ninth Circuit unanimously affirmed (Pet. A9, A70). Stating that "on its facts [this] is not a close [case]" (Pet. A57–A58), the court held:

> Crown, with its leadership in production and sales of the product-line papers, its great disparity in size as compared with other competitors in the area, and its position as a price leader in the market, was already in a dominant position before the merger. Its acquisition of St. Helens could not help but substantially increase that dominance. It significantly added to its concentration of power.

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machines technically adaptable to it (R. 617–18); and that St. Helens was not a failing company, the acquisition of which might be permissible under *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (R. 619–20).

While "[t]his alone justified the Commission's finding" of violation, the court pointed out that the decision was further supported by specific "practical effects" of the elimination of St. Helens (Pet. A58). It noted St. Helens' important position as a supplier of independent jobbers and converters, who were now under the "competitive disadvantage" of having to buy from a competitor, Crown (Pet. A59–A61), and some of whom had already been harmed by Crown's denial of certain services (Pet. A61–A63).

The court fully considered and rejected petitioner's objections to the Commission's subsidiary findings with respect to the market shares held by Crown and its competitors. The court focused on the three Pacific Coast states as the relevant geographic market, noting that the Commission had found this to be an alternative market (Pet. A33–A37, A68–A69). While holding that the Commission's finding as to the relevant product market was supported by the record (Pet. A26) and that Census coarse papers "collectively may properly identify the relevant market here involved" (Pet. A30), the court added to that market "manufactured bags" (Pet. A31)—the only converted product that St. Helens sold in substantial amounts (Pet. A21 n. 6). Responding to Crown's argument that the Commission had improperly relied on statistics of production rather than sales within the area, the court examined the sales data in the record (Pet. A20–A22, A36–A45) and concluded that in 1952, before the merger, Crown sold about 50.5% of the Census coarse papers plus manu-

factured bags purchased in the Pacific states and St. Helens sold about 10.81% (Pet. A45).[11] The court ruled that "the evidence of increased dominance and concentration" would bear out the Commission's decision with or without its "minor alteration" of the product market, and that the impact on the Pacific coast market was consistent with the Commission's finding of violation in a larger area. It held that there was "no occasion here to remand for further findings" by the Commission (Pet. A68, A70).[12]

Crown's petition for rehearing was denied (Pet. A76–A82). The court held that *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, did not require remand, for while the court's prior opinion had supplied statistics from the record, these "reinforced and supported the Commission's findings" and the court had "in no manner disapproved or rejected the Commission's bases for its decision" (Pet. A77). The court stressed that "we were but adopting and reenforcing the *ratio decidendi* of the Commission" (Pet. A78).

The Ninth Circuit reaffirmed the correctness of the sales statistics on which it relied in testing the Com-

[11] See n. 10, *infra*, p. 20.

[12] The court also held that the receipt in evidence of a market survey did not deny Crown a fair hearing and was "no more than harmless error", since the survey was not relied upon by the hearing examiner or the Commission, and was likewise "disregarded" by the court (Pet. A64–A66). See n. 9, *supra*. The court further sustained the Commission's rulings that the anticompetitive impact of the merger was not lessened by the prospect of new entrants and that St. Helens was not a failing company. See n. 10, *supra*.

mission's conclusions, finding them "substantially correct" (Pet. A79). Moreover, it held (Pet A81):

> The fact is that no combination of figures of production or sales found in the record can possibly modify or alter the basic findings of the Commission and of this court that prior to the merger Crown's position in the market was a dominant one; and that after it had absorbed St. Helens, which was practically the only real and substantial producer in a position to compete with Crown, all up and down the line, Crown's dominance of the market became overwhelming.

## ARGUMENT

The 68-page petition submitted by Crown presents no substantial question warranting further review by this Court. As the Ninth Circuit stated, this is not a close case (Pet. A57). Petitioner does not even dispute the basic holding of both the court of appeals and the Commission that Section 7 of the Clayton Act is violated when the dominant firm in a market acquires one of its few substantial competitors, with the consequences here shown.

Rather, the petition is devoted to a dissection of subsidiary findings and computations in an effort to find inconsistencies between the market analyses of the court and Commission. As we shall show, these market analyses are consistent and, in any event, the minor variations in approach do not detract from the findings and reasoning common to both decisions below, which are sufficient to invalidate the merger. The court of appeals was clearly correct in affirming

and refusing to remand the case. The remaining questions presented in the petition, concerning the receipt in evidence of a market survey and the scope of relief, are likewise insubstantial, and were correctly resolved below.

1. Under Section 7 of the Clayton Act as amended in 1950, the merger of Crown and St. Helens is invalid if its effect "may be substantially to lessen competition, or to tend to create a monopoly." Congress clearly intended that a merger or consolidation would be struck down under Section 7 of the Clayton Act well before it would violate the Sherman Act. See S. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4–5. To achieve that objective, Congress made a merger illegal when it results in one of the following proscribed consequences listed in the House Report:

> elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.); *United States* v. *Koppers Co., Inc.*, 1962 Trade Regulation Reporter ¶ 70, 194 (W.D. Pa.).

The instant case presents the most straightforward situation for implementation of the Congressional

policy—the acquisition by a leading firm of one of its few substantial competitors in an oligopolistic market. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 276–283, 299–308. Both the court of appeals and the Commission unequivocally held that Crown occupied the "dominant" position, with a "commanding lead" over its rivals in the Western market (Pet. A58, A81, R. 615), and that St. Helens was an important competitor, the third largest company in a market containing only four substantial competitors (including Crown and St. Helens) and six firms with insignificant market shares (Pet. A45, A58, A81; R. 614–15).

These facts alone, as the Ninth Circuit held (Pet. A58), justified a finding of violation, since the merger clearly eliminated "a substantial factor" and seriously increased the "relative size" of the dominant firm (H. Rep. 1191, *supra*). Moreover, both the court of appeals and the Commission found that St. Helens had been particularly important as a non-integrated supplier to independent jobbers and converters. It was "practically the only real and substantial producer in a position to compete with Crown, all up and down the line" (Pet. A81, A59–A61; R. 616–17). By the merger, the independents were put under the "competitive disadvantage" of having to rely for supplies upon Crown which was also their major competitor (Pet. A59; R. 616–17); they were "deprive[d] * * * of a fair opportunity to compete" (H. Rep. No. 1191, *supra*).

Contrary to petitioner, therefore, the court of appeals has not "reject[ed] every one of the Commission's main grounds for decision" (Pet. 28), but relied upon the very same reasoning. The decision below is thus consistent with the principle of *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, that "[t]he grounds upon which an administrative order must be judged are those upon which * * * [it] was based." As the court of appeals itself pointed out, it "in no manner disapproved or rejected the Commission's bases for its decision" (Pet. A77) but "adopt[ed] and reenforc[ed] the *ratio decidendi* of the Commission" (Pet. A78).

2. Petitioner objects, however, to the Ninth Circuit's partial reliance upon its own statistical findings of market shares from the record. The short answer is that, in sustaining the Commission's findings and conclusion, the court did "not necessarily have to sustain the [Commission] on each and every one of its subsidiary findings of fact," so long as the record contains sufficient evidence to support the conclusion. *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 139 (C.A. 1), certiorari denied, 346 U.S. 887; see *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 247. "Remand would be called for only if there were a solid reason to believe that without that subsidiary finding the agency would not have arrived at the conclusion at which it did arrive." *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 67; *National Labor Relations Board* v. *Reed & Prince Manufacturing Co.*, *supra*; *Central*

*Mercedita, Inc.* v. *National Labor Relations Board*, 288 F. 2d 809, 812 n. 1 (C.A. 1). Clearly remand was not called for here. For, as the Ninth Circuit held, "no combination of figures of production or sales found in this record can possibly modify or alter" the basic findings made by both the court and Commission as to the dominance of Crown and the importance of St. Helens' competition (Pet. A81).

In any event, as the court below explicitly stated, its statistical analysis—which showed virtually the same shares of the market as the Commission's—"reinforced and supported the Commission's findings" (Pet. A77), and did not contradict them. Moreover, both the court's and the Commission's conclusions are supported by consistent findings on each of the three subsidiary issues much argued by petitioner—(a) line of commerce; (b) section of the country; and (c) production and sales data.

(a) *Line of Commerce.* This Court has held that a "line of commerce" under Section 7 can consist of any product or group of products that have sufficient peculiar characteristics and uses and are sufficiently distinct from other commodities, so long as the market affected is substantial. *United States* v. *duPont & Co.*, 353 U.S. 586, 593, 595. Applying this test, the Commission found that the "physical characteristics, markets, prices, and uses" (R. 610) of the Census category of coarse papers viewed collectively established them as "a sufficiently distinct product line to be a 'line of commerce' within the meaning of Section 7" (R. 612). The court of appeals held that this finding "was based upon a

substantial amount of evidence" (Pet. A26) and that Census coarse papers "collectively may properly identify the relevant market here involved" (Pet. A30). However, responding to petitioner's assertion that the relevant market should include "all paper of the type made by St. Helens" (see Pet. 23), the court then examined the situation presented by adding to the market the only additional item that St. Helens "produced and sold in substantial amounts" (Pet. A31, A21)—manufactured bags.

Petitioner argues that in so doing the court "decided that the Commission had misconceived the relevant line of commerce" (Pet. 30), and therefore a remand is necessary. On the contrary, the court made clear when it stated that "the product market here, whether it includes or excludes manufactured bags" constitutes "a distinct and a substantial [market]" (Pet. A24), that it was merely amplifying and not repudiating the product-line selected by the Commission. Furthermore, it is settled that Section 7 is violated "if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce" (*United States* v. *duPont*, *supra*, 353 U.S. at 594–595 n. 13; *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253) and that several lines of commerce can properly be selected for the purpose of analyzing the effect of the merger (*United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 595 (S.D.N.Y.)). Here, the court expressly found that "the evidence of increased dominance and concentration which we have noted will bear out the Commis-

sion's findings whether "paper bags are or are not included in the relevant product market" (Pet. A68).[13]

It is also alleged that the court erred in holding that the Commission "need not consider evidence as to the flexibility of production equipment and the interchangeability of products in defining the relevant market" (Pet. 4), and this alleged holding is said to place the present case in conflict with *United States* v. *du Pont & Co.*, 351 U.S. 377 (the *Cellophane* case), and *United States* v. *Columbia Steel Co.*, 334 U.S. 495. While the court did state that a narrower test of product interchangeability was appropriate for Section 7 cases than for the monopolization provisions of the Sherman Act (Pet. A28–A29),[14] it did not rest its definition of the product market on this ground alone. As a totally separate and independent ground for its affirmance, it adopted the Commission's finding that

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[13] The court clearly relied upon the rationale of *United States* v. *duPont & Co.*, *supra*, in defining the market (see Pet. A24, A30) and its references to the substantiality of St. Helens' production of manufactured bags were intended to show that bags constituted a "substantial" market (353 U.S. at 595). The additional products that petitioner would add to the line of commerce were not produced by St. Helens in substantial quantities (Pet. A21; see R. 589–90), are not sufficiently like Census coarse paper to be added to that market and are not sufficiently homogeneous to be viewed collectively (R. 610–11; see Pet. A26).

[14] In support of this view the court correctly relied upon this Court's decision in *United States* v. *du Pont & Co.*, 353 U.S. 586 (the *General Motors* case), and upon *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (Pet. A28–A30). See also Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 305–307.

there was no product interchangeability between Census coarse papers and other coarse papers, holding that "the contention of interchangeable or substitutable products here is simply not borne out by the facts" (Pet. A29; see Pet. A15–A16, A26, A30). The Commission had found that "[t]he nature of many papers [which petitioner proposed to add to the product market] indicates that they are unsuitable generally for any purpose other than that for which they are made"; and that papers which perhaps were theoretically interchangeable in use, were not much substituted for each other "in actual practice" (R. 611). See R. 356, 1683, 3007–13, 3821–22, 3837–39. Thus, petitioner's claim of a conflict with the *Cellophane* case disregards not only the different statutory provisions involved but also explicit findings of an absence of that interchangeability of products which was crucial to the *Cellophane* case.

Crown's contention that the present decision authorizes a disregard of the availability of competition to Crown resulting from simple alterations in other paper manufacturers' production equipment and thereby comes into conflict with *United States* v. *Columbia Steel Co.*, 334 U.S. 495, is also wholly without merit. As to the flexibility of production equipment, the Commission found that paper companies "are now engaged in the manufacture of types or grades of paper for which there is a present consumer demand" and for the marketing of which they have developed sales organizations (R. 595, 618) and that "substantial shifts in production" are therefore not to be expected

(R. 618).[12] The Ninth Circuit held petitioner's argument to be "not persuasive here" on the same basis.

Moreover, even without regard to these conclusive determinations of fact, it is apparent that the *Columbia Steel* case involved a question totally different from that presented here. In *Columbia Steel*, the government argued that the purchase of Consolidated Steel Corporation by United States Steel would foreclose a significant market to the competitors of United States Steel who formerly sold rolled steel plates and shapes to Consolidated. The Court held that, in assessing the extent of the purchasing market foreclosed and the consequent harm to sellers, rolled steel products was the appropriate market since "[i]n this case and on this record" Consolidated's former suppliers of rolled steel plates and shapes could easily shift their production and sell different rolled steel products to other consumers. 334 U.S. at 511.

The vice of the instant case is not that it foreclosed the market in which St. Helens purchased. The merger eliminated one of four major competitive sellers from the market available to buyers of coarse papers. This difference has great significance, for while there is every reason to assume that a producer will make any readily available changes in his method of production which are necessary to compensate for a

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[12] In the instant case, the record conclusively establishes that suppliers of products other than Census coarse papers will not substantially shift their production to serve the former customers of St. Helens (see *e.g.*, R. 1414, 1693, 1770, 2126–27, 2250, 2555–56). See *United States* v. *Bethlehem Steel Corp.*, *supra*, 168 F. Supp. at 592–593 n. 34.

lost purchasing market, there is absolutely no reason to assume that paper manufacturers, which did not see fit to compete with Crown and St. Helens when they were separate entities, would change their method of production in order to compete with a new, more powerful Crown-St. Helens combination.

(b) *Section of the Country.*—A "section of the country" may be taken as the geographic market for purposes of Section 7 if it is an "area of effective competition" (S. Rep. No. 1775, 81st Cong., 2d Sess., p. 6, quoting *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299 n. 5).[18] In the instant case, the Commission concluded that the eleven Western states constituted the appropriate section of the country in which to test the effect of the merger on the basis of findings that both St. Helens and Crown made over 80% of their sales of product-line papers in the eleven Western states and that producers from outside the area sold "relatively insignificant" amounts of such papers in the West and were "generally unreliable sources" of supply (R. 612–13, 616). In addition, the Commission, noting that the "great bulk" of the sales by Crown and St. Helens were in California, Oregon and Washington, held that "[t]he evidence is likewise sufficient to show that the three Pacific Coast States * * * constitute a section of the country, within the meaning of Section 7" (R. 613).

[18] The Senate Report continued, that the appropriate geographic market may be one which includes an "appreciable segment of the trade" or "which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country." S. Rep. No. 1775, p. 6, *supra*.

The court of appeals pointed out that the Commission considered the Pacific states an alternative market (Pet. A33–A34, A68–A69). It also noted that "the most active and extensive competition" between Crown and St. Helens occurred in that area, and that the three-state market was "the area which could be best served and supplied by these producers" and was "subject to common economic forces * * * which set it apart" (Pet. A35). Accordingly, it considered the Pacific Coast states as the market within which to measure Crown's and St. Helens' market position (Pet. A34–A36).

The findings of the court and Commission are consistent, since both recognized the propriety of the Pacific Coast states as a "section of the country" under Section 7. Moreover, since the western consumption of the paper products here involved is very heavily concentrated in the Pacific states (see RX 80, RX 82 (separately bound)), there is no reason to believe that there would be any significant variation in market shares between the two relevant areas discussed by the Commission and the court.[17] Petitioner

[17] There is no conflict, therefore, with *Eric Sand and Gravel Co. v. Federal Trade Commission*, 291 F. 2d 279 (C.A. 3), as alleged by petitioner (Pet. 38–40). In that case, the Commission had not made any findings concerning the geographical market which the court deemed relevant and the modification of the area had an obviously drastic effect upon the market shares of the merging companies. Remand was therefore necessary to obtain the Commission's view on the effect of the merger in the new market. Here, as already stated, the Commission has indicated that the Pacific states constitutes an appropriate area, and there is no resulting change in the market shares upon which the Commission rested its finding

makes no suggestion that there is any difference (see Pet. 28, 30–31, 34, 38–40) and the opposite is demonstrated by the findings of market shares below (*infra*, pp. 7, 11).[18]

(*c*) *Production and Sales Statistics.* Petitioner asserts as error that the court below relied upon statistics of sales in the regional market, while the Commission had utilized production data to show market shares (Pet. 28, 31). However, the Commission had made its analysis on the basis of findings that the western market was "in relative isolation" (R. 615), that Crown and St. Helens, for example, sold the great majority of their product in that market (R. 613), and that sales in the area by producers

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of a violation of Section 7. Nor is there a conflict with either of two more recent Third Circuit opinions. In *Scott Paper Co.* v. *Federal Trade Commission*, 1962 Trade Regulation Reporter ¶ 70, 271, the court remanded to the Commission on the ground that the record did not contain evidence necessary to support the Commission's conclusion. In *A. G. Spaulding & Bros., Inc.* v. *Federal Trade Commission*, *id.*, at ¶ 70, 266, as in this case (see, *e.g.*, Pet. A26), the Commission's order was affirmed as supported by substantial evidence, although the court mentioned in a footnote a difference in views as to whether the standard of review should be verbalized as "substantial evidence" or "clearly erroneous."

[18] Moreover, petitioner has insisted throughout upon as broad a geographic market as possible, and the court below was justified, therefore, in concluding that since the Commission found that the merger violated Section 7 when tested in the eleven Western states, "then *a fortiori* it offends the statute if the more limited three Pacific states area is deemed the relevant market" (Pet. A70). It is settled that a merger is illegal if it has the proscribed effects "in any section of the country." See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 603, 618–619 (S.D.N.Y.).

located elsewhere were "relatively insignificant" (R. *ibid.*). On that basis, the Western firms' production data obviously bore a direct relation to their relative positions as suppliers to the Western market.

The court below did not overrule the findings or reasoning of the Commission on this point. Indeed, it stressed that "productive capacity" had "substantial bearing" on the existence of a violation, and stated that Crown's "predominance of production" in the Western market, enhanced by the merger, "would appear not only to be a threat to possible competition but to approach a monopoly situation" (Pet. A49; see Pet. A50–A51). The court also found that there was substantial evidence, in the testimony of witnesses, to support the Commission's finding that the imports from outside the Western market were not a significant factor (Pet. A42–A43).

Nevertheless, assuming the validity of petitioner's argument that "sales statistics rather than production figures are generally speaking more significant in arriving at the relevant market" (Pet. A19–A20), the court showed that the merger was also unlawful in the light of statistics on sales in the record. An estimate was made of the sales attributable to producers located outside the market area by use of an Interstate Commerce Commission analysis of a 1% sample of all railway waybills of wrapping paper and bag shipments into the Pacific states during the years 1949 to 1953. The court estimated this figure at its uppermost possible limit, 11.1% of sales (Pet. A39–A45), while recognizing that "there is nothing in the

record to support so high a figure" (Pet. A44).[19] Even this estimate, however, did not dilute Crown's market position achieved by virtue of its production dominance, since the court found that Crown's share of the sales in the Pacific states before the merger was 50.53%, to which the merger added St. Helens' 10.81% (Pet. A45). Statement, *supra*, pp. 7, 11.[20]

3. Petitioner claims that it was denied due process by "the admission into evidence of a purported summary of a secret *ex parte* mail order survey" taken by the Commission (Pet. 53), which "had the result of so permeating the record with distortion and falsehood that a fair trial became impossible" (Pet. 56).

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[19] In computing the sales percentages, the court figured sales in the Pacific states by companies outside the area at a maximum which was almost certainly higher than the actual sales, thus understating Crown's share (Pet. A38–A44). As the court said, the record was "unsatisfactory" and "fragmentary" on these sales and on sales of the smaller western producers (Pet. A38–A39, A45) and it avoided any doubt by using the conservative assumptions which attributed to the two factors 11.1% and 4.02% of sales, respectively.

Petitioner has repeatedly and erroneously cited the court's reference to the "unsatisfactory" and "fragmentary" evidence on these sales as if it referred to the entire record and undermined all statistics (Pet. 26, 32, 33, 53).

[20] While petitioner continues to contest the validity of the court's determination of the relevant shares of market sales, the issue is certainly not one meriting review by this Court. Moreover, any difference in view as to the proper calculation of Crown's and St. Helens' shares of market sales could in no way affect the result of the present case. As the court specifically pointed out, "[e]ven if we were to accept petitioner's revised figures, we would be obliged * * * to reach the * * * conclusion that the acquisition would probably result in a substantial lessening of competition and tend to create a monopoly" (Pet. A79).

The short answer, as the court of appeals held, is that allowing the survey to remain in the record was at most "harmless error" (Pet. A65), because neither the hearing examiner (R. 586), the Commission (R. 620), nor the court (Pet. A65–A66) relied upon it in reaching its decision. See Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e), which requires that the reviewing court take "due account" of the "rule of prejudicial error". Petitioner does not create a substantial question by its innuendo that the disavowals of reliance on the survey were less than candid (see Pet. 18, 28, 56–57, 60–62). This Court has held in a converse situation, that "with due regard to the conscientiousness which we must attribute to another branch of the Government, we cannot reject its explicit avowal that it did take into account evidence which it should have considered unless an examination of the whole record puts its acceptance beyond reason." *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 229. Equally the Court should not, without reason, reject the agency's assurance that it disregarded evidence, especially when there is other overwhelming support for its findings.

The facts underlying petitioner's innuendos of an "outrageous" use of *ex parte* surveys and secret communications are summarized in footnote 9, p. 8, *supra*, and in the court's opinion at Pet. A64–A66. It is sufficient for the present to note that all the answers to the questionnaires received by the Commission, correspondence in connection therewith and Commission work papers, except for a sales analysis of the

Longview Paper Co., were all turned over to petitioner during the hearing and it was free to use them in any proper manner (R. 968–69). This was clearly conceded by petitioner's counsel in his argument concerning one remaining questionnaire which was later turned over to petitioner (R. 943–44, 971–72). The sales analysis of the Longview Paper Co. had been used only to check the names of converters and jobbers to whom questionnaires were to be sent, and, therefore, the examiner justifiably concluded that petitioner should not have the unrestricted right to examine it (R. 967–71).

4. Finally, petitioner argues (Pet. 63–67) that the Commission's order provided relief which was improperly broad in that it requires (1) divestiture of St. Helens' timberlands and (2) the restoration of St. Helens "as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of acquisition" (R. 604).

These remedial provisions are well within the Commission's "wide discretion in the choice of a remedy deemed adequate to cope with the unlawful practices." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 396. Restoration of the pre-existing competitive situation by divestiture is the normal remedy for corporate combination which eliminated competition in violation of Section 7, *United States* v. *duPont & Co.*, 366 U.S. 316, 329. It clearly was appropriate to require divestiture of the St. Helens timber holdings

acquired in the merger, along with its plant facilities, for this purpose. Such holdings are an important adjunct to any paper mill. They were St. Helens' insurance against seasonal shortages in the supply of woodchips and fluctuations in the open market price of wood (R. 2022–23). Their retention would, therefore, serve to "enhance the dominant position held by [Crown]" (R. 593) and prevent St. Helens from becoming as strong a competitor as it was before Crown acquired it.

The merger's adverse effect upon competition could be corrected only by recreating competition of the same vigor as that which had been eliminated. Thus, "piecemeal sale" would not reestablish a reliable source of supply for independent converters and jobbers (R. 622). Cf. *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554, 558–560. Moreover, the provision for restoring St. Helens as a competitive entity "substantially as it existed at or around the time of the acquisition" was essential, from the standpoint of a prospective buyer, to the divestiture of an enterprise whose viability had been established by experience. This provision also permitted Crown to propose a plan of divestiture under which it might retain those improvements added by it which are not necessary to St. Helens' operating condition and organization as a competitive entity (R. 621). Crown's objection to the form of divestiture ordered is, in any event, premature since it has not yet filed any plan of divestiture and the Commission has thus not had occasion to interpret its order. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653–654.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*
LEE LOEVINGER,
*Assistant Attorney General.*
LIONEL KESTENBAUM,
GEORGE R. KUCIK,
*Attorneys.*

JAMES MCI. HENDERSON,
*General Counsel,*
J. B. TRULY,
*Assistant General Counsel,*
FREDERICK H. MAYER,
GERALD HARWOOD,
*Attorneys,*
*Federal Trade Commission.*

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IN THE

# Supreme Court of the United States

October Term, 1961

CROWN ZELLERBACH CORPORATION,
*Petitioner,*

—against—

FEDERAL TRADE COMMISSION,
*Respondent.*

## PETITIONER'S REPLY BRIEF

HOWARD T. MILMAN
ROY L. PROSTERMAN
48 Wall Street
New York 5, N. Y.

PHILIP S. EHRLICH
2002 Russ Building
San Francisco 4, California,
*Attorneys for Petitioner*

SULLIVAN & CROMWELL
*Of Counsel*

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IN THE

# Supreme Court of the United States

**October Term, 1961**

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CROWN ZELLERBACH CORPORATION,

*Petitioner,*

—against—

FEDERAL TRADE COMMISSION,

*Respondent.*

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## PETITIONER'S REPLY BRIEF

The Commission now agrees that *Columbia Steel** is applicable in analysis of the dimensions of the market in a Section 7 case, thus conceding error in a major and controlling premise of the decision below. Application of *Columbia Steel* would so change the dimensions of the relevant market and so substantially reduce Crown's share of the market as to require reversal on the merits.

The Commission's brief in opposition does not come to grips with the issues presented in the petition for certiorari but relies here on the fact that the Ninth Circuit expressed no doubts as to the correctness of its decision. This is not sufficient excuse for the Ninth Circuit's failure to heed the admonition in the *Chenery*** cases or for its reliance on "fragmentary" and "unsatisfactory" evidence as the basis for decision. The conflict between the Third and Ninth

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* *United States v. Columbia Steel Co.*, 334 U. S. 495.

** *SEC v. Chenery Corp.*, 318 U. S. 80 and 332 U. S. 194.

Circuits, demonstrated in the petition, has since been reaffirmed by two later decisions of the Third Circuit, in *Spalding** and *Scott Paper*,** discussed below.

1. The Commission's argument in this Court assumes the correctness of the Ninth Circuit's market definition; it does not, however, attempt to demonstrate that the Ninth Circuit was correct. Thus, although the Commission now concedes the applicability of *Columbia Steel* in Section 7 cases (Res. Br. 19-21), it cannot deny that the decision below was expressly based upon the holding that *Columbia Steel* was not applicable (A-30, 31) and that the Ninth Circuit explicitly refused to analyze the evidence in the light of this Court's holding in *Columbia Steel*.

The increase in market dimension required by *Columbia Steel*, and by the *Cellophane**** case and *Tampa Electric*****, the applicability of neither of which seems to be any longer in serious dispute (Res. Br. 19-20), makes inapposite all of the Court's findings as to competition and market shares. The Commission's only response is a cursory and unsuccessful attempt to argue that the Federal Trade Commission and the Ninth Circuit might have reached the same result if they had analyzed the facts in the light of these decisions, instead of rejecting them (Res. Br. 19-22). This, however, is a question which should be settled by remand with instructions to apply the cited deci-

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* *A. G. Spalding & Bros. Inc.* v. *FTC*, 5 CCH Trade Reg. Rep. ¶ 70,266 (March 22, 1962).

** *Scott Paper Co.* v. *FTC*, 5 CCH Trade Reg. Rep. ¶ 70,271 (March 27, 1962).

*** *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377.

**** *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320.

sions, a remand which, under *Chenery*, should be with directions to the Court of Appeals to remand to the Federal Trade Commission.

2. The Commission does not here dispute the applicability of the *Chenery* doctrine, but attempts to avoid its impact by labeling as "subsidiary findings" the Ninth Circuit's original findings as to the line of commerce, the section of the country, and shares of the market (Res. Br. 13, "1." at 14-16). That these are primary premises of the decision rather than "subsidiary findings" is too well established to become a point of contention. See *duPont-General Motors**; *American Crystal Sugar***; and *Transamerica****; see also *Cellophane* and *Columbia Steel*; and see Pet. 29-38. But if respondent's argument deserves to be taken seriously at all, it raises a most substantial question as to what *Chenery* means by "the grounds upon which an administrative order . . . was based" (318 U. S. at 87), in the context of review of Section 7 decisions, a question on which the Third Circuit has taken a view directly opposite to that espoused by the Ninth Circuit and the Commission's brief (see Pet. 38-40; pp. 4-7, *infra*).

3. The Commission disregards—because on the record there is no alternative—the clear demonstration of the major factual errors committed by the Ninth Circuit when, without the participation of counsel and without the guidance of any findings whatsoever on the subject by the Commission, the Ninth Circuit researched the record to make

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* *U. S. v. E. I. duPont de Nemours & Co.*, 353 U. S. 586, 593.

** *American Crystal Sugar v. Cuban American Sugar Co.*, 259 F. 2d 524, 527 (2d Cir. 1958).

*** *Transamerica v. Board of Governors*, 206 F. 2d 163, 169-170 (3d Cir. 1953), *cert. denied*, 346 U. S. 901.

the share of the market estimates which the Court found essential for decision and which the Commission had failed to make.

The Commission's attempted treatment of the survey evidence question not only fails to meet any of the issues raised but totally ignores half—and a clearly distinguishable half—of the point. The Hearing Examiner received the evidence and refused to strike it, but disclaimed basing his opinion upon *the part* of the survey evidence which is now Commission's Exhibit 176 (R. 585-86). The Commission reviewed the survey evidence and affirmed, disclaiming reliance upon the same *part* of the survey evidence (R. 620), but nevertheless insisted that it be printed for the Court of Appeals. The Court of Appeals reviewed it and in its opinion referred to relatively obscure details of it, but again disclaimed reliance upon the same *part* of the survey evidence (A-65, 66). Throughout, however, petitioner has complained not only of Commission's Exhibit 176, but the testimony of the Commission's only expert witness (R. 5162-5244), upon whom *no one* has ever disclaimed reliance, and which was based solely on the survey. (See Pet. 55, 57.)

4. Petitioner's facts and arguments are stated in its petition and they furnish the reply to the factual assertions and arguments in the Commission's brief in opposition. We need add only a discussion of the *Spalding* and *Scott Paper* cases, referred to in a footnote of the Commission's brief (Res. Br. 23 n.17, at 24), which were decided by the Third Circuit after the petition for certiorari was filed and which confirmed and sharpened the conflict, set forth in the petition, between the present case and the Third Circuit's

decision in *Erie Sand and Gravel**. These two decisions involved, as did *Erie*, appellate review of divestiture orders of the Commission under Section 7.

In *Spalding*, the Third Circuit affirmed a Federal Trade Commission finding that the acquisition of one large sporting goods manufacturer by another had violated the amended Section 7. In so doing, the Court scrupulously analyzed the grounds adduced by the Commission itself for the decision to ascertain whether those precise grounds could properly afford a basis for affirmance of the Commission's decision. The Court affirmed only after determining that the lines of commerce and section of the country found by the Commission could be approved as appropriate bases for the decision.

The Court expressly contrasted the procedure which it was following with the procedure of the Ninth Circuit in the instant case. Under a section of its opinion entitled "The Function of Appellate Review", the Third Circuit stated that (5 CCH Trade Reg. Rep. at p. 76,070)

> "In determining the question of reasonable probability [that competition would be lessened], however, it is well settled that the 'weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn therefrom are for the Commission.' . . . The function of the appellate court 'is limited to determining whether upon a review of the whole record it appears that the Commission's findings are supported by substantial evidence.'[32]"

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* *Erie Sand and Gravel Co. v. FTC*, 291 F. 2d 279 (1961).

The Court's footnote 32 reads:

> "*The recent Section 7 case decided by the Ninth Circuit seems to be contra.* In *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (1961), the court notes the dual system of enforcement of Section 7 and rejects the suggestion 'that because the Commission's "specialization and expertise" are peculiarly adapted to its intended task of policy "clarification and completion" our power to review these findings [of the Commission] is more limited than our power to review findings of a court,' citing *Matter of Pillsbury Mills*, 50 F. T. C. 555, 564-565 and Davis, Administrative Law Treatise, § 29.02. In *Zellerbach* the court applied '*the same "clearly erroneous" test in the same manner as if the findings . . . were those of a district court.*' 296 F. 2d at p. 815, n. 11." (Omission is the Court's; italics supplied.)

In *Scott Paper*, the Third Circuit set aside a Federal Trade Commission decision that Scott's acquisition of one pulp and two paper manufacturers had been in violation of the amended Section 7. Once again, the Court carefully analyzed the grounds of the Commission's decision and the evidence adduced by the Commission to support those grounds. The Court found that the chief coherent evidence relied upon by the Commission as a basis for its findings was a market survey conducted by the Commission. The Court further found that the disputed survey statistics, which covered only the years 1950 and 1955 and none of the intervening years, were capable of several alternative explanations and did not adequately support the Commission's findings, although they showed that Scott's market shares were larger in 1955 than in 1950. At this

point, rather than itself interpreting the survey data or itself searching other portions of the record, the Third Circuit remanded to the Commission, refusing "to resort to speculation as to what happened with respect to Scott's market shares during the years 1951 to 1954." (5 CCH Trade Reg. Rep. at p. 70,081). The Court pointed out that important issues of law were presented and that "the resolution of these issues of law requires that whatever factual premise may be asserted as the basis of their application be as definitive and revealing as may be possible and capable of proper assessment." (*Ibid.*)

By these decisions the Third Circuit has further demonstrated its fixed opposition to the affirmance of Commission decisions respecting legality of mergers under the amended Section 7 by resort to findings as to line of commerce, section of the country or market shares other than those used by the Commission in making its decision, and its refusal to determine, by speculative review of the record, whether it would have come to the same conclusion on different findings as to these basic grounds of decision.

This conflicts squarely with the Ninth Circuit's decision in the instant case, where the Court rejected the major premises of the Commission's decision and, instead of reversing, went on to find new and different grounds for the Commission's order, from a record which, moreover, was admittedly "unsatisfactory" and "fragmentary" with respect to market shares.

According to the Commission, the statement by the court below that this is not a "close case," viewed in isolation from the substantive analysis on the basis of which it was ultimately stated that this is "not a close case," justifies

whatever procedures may have been employed to reach those substantive conclusions. By this circular reasoning, however, the Commission may not set aside the normal safeguards and allocations of function which this Court has laid down to ensure the responsibility of the administrative process and the protection of the substantial rights of litigants.

## CONCLUSION

The writ of certiorari, as respectfully prayed in the petition, should be granted.

Respectfully submitted,

HOWARD T. MILMAN
ROY L. PROSTERMAN
48 Wall Street
New York 5, N. Y.

PHILIP S. EHRLICH
2002 Russ Building
San Francisco 4, California

*Attorneys for Petitioner*

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